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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~1040~~ 46

W. B. PARKER, DIRECTOR OF AGRICULTURE, AGRICULTURAL PRORATE ADVISORY COMMISSION, RAISIN PRORATION ZONE No. 1, ET AL., APPELLANTS,

*vs.*

PORTER L. BROWN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED MARCH 13, 1942.

# SUPREME COURT OF THE UNITED STATES

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INDEX.



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—6886

[fol. 1-78]

**IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION**

No. 78 Civil

PORTER L. BROWN, Plaintiff,

vs.

W. B. PARKER, Director of Agriculture, AGRICULTURAL PRORATE ADVISORY COMMISSION, RAISIN PRORATION ZONE #1, Program Committee, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, Preston McKinney, H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchoir Hansen, A. L. Davidson, W. J. Cecil, J. C. Harlan, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe and Eight Doe, Defendants

AMENDED COMPLAINT FOR INJUNCTION—Filed December 28, 1940

Plaintiff, for cause of action against the defendants, alleges:

I

That jurisdiction is founded on the existence of Federal questions and amount in controversy; that the action arises under the Constitution of the United States, Article I, Section 8, Clause 3, and under Title 15, Sections 1 to 33 of the United States Code, as hereinafter more fully appears; that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

[fol. 79]

II

That defendant Raisin Proration Zone No. 1 is and at all times mentioned herein has been a proration zone organized under the Agriculture Prorate Act of the State of California; that by virtue of said act there now exists an Agricultural Prorate Advisory Commission composed of the following persons: W. B. Parker, Ira Redfern, Lyman

Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, and Preston McKinney; that the said W. B. Parker is Director of Agriculture of the State of California; that under said act there now exists a program committee of Raisin Proration Zone No. 1 composed of H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchoir Hansen, and A. L. Davidson; that the defendant W. J. Cecil is the zone agent of said zone.

III

That plaintiff is now and at all times herein mentioned was the owner of 100 acres of real property in the County of Fresno, which is in Raisin Proration Zone No. 1; that at all times mentioned herein plaintiff has had planted on said real property grapevines from which plaintiff has made and does now make raisins.

IV

That the program committee of said zone has attempted to institute a seasonal marketing program which defendants declared effective September 7, 1940; that defendants threaten to enforce said alleged seasonal marketing program against plaintiff; that said program provides briefly that all sub-standard raisins shall be withdrawn from the market; that 20% of the raisins produced by plaintiff and others shall be placed in a surplus pool and that plaintiff and others shall receive therefor the sum of $27.50 per ton on delivery to said zone; that 50% of the raisins produced by said plaintiff and others shall be used by said zone as a stabilization pool and that said plaintiff and other grow-[fol. 80] ers shall receive therefor on delivery to said zone the sum of $55.00 per ton; that 30% of the raisins produced by plaintiff and said growers shall be called free tonnage and that said plaintiff and other growers may sell said free tonnage without restriction upon paying to said zone the sum of $2.50 per ton for the privilege of selling such free tonnage; and that no packer or handler of raisins may purchase any standard or sub-standard raisins from any of the growers in said zone until said growers have complied with all of the foregoing requirements and received primary and secondary certificates from said zone evidencing such compliance.

V

That approximately 95% of the raisins grown by plaintiff and the other producers in Raisin Proration Zone No. 1 are sold in interstate or foreign commerce and that the raisins grown in said zone constitute approximately 95% of the naturally dried raisins produced in the United States; that plaintiff is deprived by reason of said act and program of his right to dispose of his raisins in interstate and foreign commerce.

VI

Plaintiff further alleges that heretofore plaintiff has engaged in the business of packing, shipping, and selling in interstate and foreign commerce raisins produced by himself and raisins purchased by plaintiff from other persons and that plaintiff desires to continue such business; that defendants in enforcing said act and program will compel delivery to said zone of all sub-standard raisins and 70% of standard raisins produced by all the growers in said zone as hereinabove specified; that under said program defendants will, unless enjoined, withhold from the normal channels of interstate commerce all sub-standard raisins and all raisins in said 20% surplus pool; that defendants under said program will, unless enjoined, withhold the raisins in said 50% stabilization pool from the channels of interstate commerce, allowing such raisins to enter said channels only [fol. 81] at such times and in such quantities as the defendants in their discretion shall determine; that under said program defendants will, unless enjoined, permit said 30% of free tonnage to enter interstate commerce only if said 70% of standard raisins and all sub-standard are delivered to said zone; that by reason of the foregoing defendants threaten a virtual embargo on the shipment in interstate commerce of raisins grown in said zone; that prior to the alleged adoption of said marketing program plaintiff entered into contracts to sell raisins in interstate commerce; that if defendants enforce said act and program, plaintiff will be unable to secure raisins with which to fulfill said contracts and plaintiff will be subjected to liability on said contracts in approximately the sum of $8000.00 and will, in addition, lose profits on said contracts in approximately an equal amount; that plaintiff expects and will be able to ship out of this state during the current marketing season

2500 tons of raisins in addition to the raisins covered by said contracts; that as aforesaid, if defendants enforce said act and program, plaintiff will be unable to secure said 2500 tons of raisins for said shipment; that plaintiff would make a profit on said 2500 tons of raisins at the rate of from $5.00 to $12.00 per ton; and that unless defendants are enjoined from enforcing said program, plaintiff will lose such profit.

VII

That the 1940 raisin crop is now ready for the market and that the normal market for such raisins will be lost after December 20, 1940; that unless said program is quickly declared unconstitutional, the plaintiff and all the growers in said zone will be irreparably damaged by the loss of such market; that there is no adequate or speedy remedy at law to prevent such damage.

VIII

That said act and program provides civil and criminal [fol. 82] penalties so unusual, oppressive, and unreasonable that plaintiff will be precluded from asserting his rights independently and challenging in Court by defensive tactics the validity of said act and program; that plaintiff is therefore without adequate remedy at law; that if said program is enforced by defendant the value of plaintiff's vineyard and packing business will be irreparably impaired; that plaintiff is informed and believes that the enforcement of said program will cause to plaintiff an average loss of $9.00 per ton per year on raisins grown by plaintiff; that the average annual tonnage of raisins grown by plaintiff is 200 tons; that plaintiff expects to continue producing such an annual tonnage for many years in the future and, plaintiff is informed and believes, defendants will continue said program in force for many years in the future unless enjoined.

IX

That as above stated said program provides that payment for raisins shall be made upon delivery of such raisins to said zone; that said zone is unable and unwilling to pay for such raisins on delivery; that therefore said program has never been placed in operation; and that defendants

should be enjoined from seeking to compel growers and packers to comply with said act and program.

X

Plaintiff is informed and believes, and therefore alleges:

That defendants will, unless restrained, attempt to enforce and procure the enforcement of, against plaintiff, the civil and criminal penalties provided in said act; that defendants will, unless restrained, attempt to enforce and procure the enforcement of the civil and criminal penalties provided in said act against growers from whom plaintiff purchases raisins and against other persons with whom plaintiff has dealings in raisins, thereby preventing plain- [fol. 83] tiff from obtaining raisins for interstate shipment; that plaintiff has no adequate remedy at law whereby plaintiff can prevent the filing of civil or criminal actions against him or against said persons dealing with him.

XI

That defendants are maintaining at and near plaintiff's place of business watchers and spies for the purpose of ascertaining from whom plaintiff purchases raisins and for the purpose of intimidating such sellers and preventing the sale of raisins to plaintiff for shipment in interstate commerce; that the presence of such watchers and spies does intimidate such sellers and prevents such purchases.

XII

That plaintiff is informed and believes that approximately 100,000 tons have been delivered to defendant zone under said program, and plaintiff is informed and believes that defendants are now and intend to continue withholding said raisins from interstate commerce in restraint of trade and for the purpose of maintaining the monopoly prices.

XIII

That the true names of the defendants sued herein as One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, and Eight Doe are not known to this plaintiff and that plaintiff prays leave of this Court to insert their true names when they become known to him.

Wherefore, plaintiff prays judgment as follows:

1. That a Temporary Restraining Order issue restraining and enjoining the defendants from doing any of the following acts:

(a) Enforcing or attempting to procure the enforcement of, in any manner, against plaintiff the said act or program;

(b) Enforcing or attempting to procure the enforcement [fols. 84-107] of, in any manner, the said act or said program against any grower in said zone from whom plaintiff purchases raisins, or against any other person with whom plaintiff has dealings in raisins on account of such purchases or dealings;

(c) Maintaining watchers or spies within sight of plaintiff's place of business and having watchers or spies following persons with whom plaintiff has dealings in raisins.

2. That after a trial of this action a permanent injunction be issued restraining and enjoining the defendants from doing any of said acts.

3. That plaintiff be awarded such other and further relief as may be just and proper; and that plaintiff be allowed his costs of suit.

——— ———, ——— ———, Attorneys for Plaintiff.

*Duly sworn to by Porter L. Brown. Jurat omitted in printing.*

[File endorsement omitted.]

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[fol. 108] In District Court of the United States

[Title omitted]

Answer to First Amended Complaint—Filed Feb. 25, 1941

Come now all of the defendants, and each of them, in the above entitled action, and answering plaintiff's first amended complaint herein, admit, deny and allege as follows:

I

Deny each and every averment contained in paragraph I of said first amended complaint.

II

Admit the averments contained in paragraph II of said first amended complaint.

III

Admit that plaintiff is and was at all the times mentioned in the first amended complaint herein, a "producer" of raisins in the County of Fresno as said term "producer" is defined in the Agricultural Prorate Act of the State of California, and that he is and was — all such times the pur- [fol. 109] ported owner of real property in said county upon which there were planted grape vines from which raisins were made and allege that except as herein otherwise expressly admitted, defendants are without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraph III of said first amended complaint.

IV

Admit and allege that defendants, pursuant to the marketing program for raisins as amended in effect in said Raisin Proration Zone #1, did approve and adopt a seasonal marketing program for raisins for 1940 1941, effective September 7th, 1940, and that defendants have enforced and intend to enforce such seasonal marketing program for raisins against plaintiff and all other persons subject to the provisions thereof. That said seasonal marketing program provides that 20% by variety of all standard raisins of the 1940 crop produced in said Zone #1 shall be delivered into a surplus pool and that an advance shall be made on such raisins at the time of delivery of $27.50 per ton for Muscats and Thompsons and $25.00 per ton for Sultanas, to be obtained from the proceeds of a non-recourse loan from the Federal Commodity Credit Corporation, and that 50% by variety of all such standard raisins shall be delivered into the stabilization pool and that an advance shall be paid to growers upon such raisins of $55.00 per ton for Muscats and Thompsons and $50.00 per ton for Sultanas to be made from the proceeds of a non-recourse loan from said Federal Commodity Credit Corporation; and that it is further provided that the balance of each producer of 1940 crop tonnage of approximately 30% thereof may be disposed of at the

[fol. 110] discretion of the producer thereof upon the issuance to such grower of secondary certificates for which a fee of $2.50 per ton is required; and that it is further provided therein that no sub-standard or inferior grade raisins may be offered as free tonnage or delivered to the stabilization or surplus pools, but that such raisins shall be delivered into separate pools for disposal by the program committee at the best prices and under the fairest conditions obtainable, and that the net proceeds thereof shall be distributed at the earliest possible date to each grower contributing; and that all packers and handlers of raisins are prohibited from purchasing any raisins from producers in said zone until such producers have complied with the foregoing requirements and received primary and secondary certificates evidencing such compliance. Defendants further allege that under the said marketing program for raisins, as amended, and the said seasonal marketing program for 1940-1941 they arranged for and obtained a loan from said Commodity Credit Corporation, a Federal lending agency, and that as of January 22nd, 1941, there had been delivered into said stabilization and surplus pools 107,587 tons of 1940 crop raisins produced in said zone, which in accordance with the provisions aforesaid of said seasonal marketing program entitled the growers thereof to a total aggregate advance of $5,065,137.00; and that as of said January 22nd, 1941, there had been actually so advanced and paid to such growers the total aggregate sum of $4,908,000.00, and that the balance thereof was in process of being so advanced upon the completion of necessary details and papers in connection therewith. Except as herein otherwise expressly admitted and set forth, defendants deny each [fol. 111] and every averment contained in paragraph IV of said first amended complaint.

V

Allege that it is and has been continuously the practice in the raisin industry in the State of California and in said Raisin Proration Zone #1, both before and since the institution of a raisin proration program under said Agricultural Prorate Act, for producers of such raisins to sell and deliver all raisins sold and delivered by them to packers and handlers operating in the State of California and that thereupon such packers and handlers operating and doing

business within said State of California, store said raisins anywhere from a few days to a couple of years within said State and otherwise process the same in said State before disposing thereof, and then ultimately sell and deliver such raisins to the trade, both intrastate and interstate, and that a substantial amount of such raisins are ultimately shipped out of the State of California, all of which takes place at a considerable interval after the producers of said raisins have parted with the same and have lost all right, title or interest therein; and other than as herein expressly alleged and set forth, defendants deny each and every averment contained in paragraph V of said first amended complaint.

VI

Admit that plaintiff has been engaged in the business of packing, shipping and selling raisins in intrastate, interstate and foreign commerce, and that some of such raisins were produced by plaintiff and the balance thereof plaintiff purchased from other producers and was engaged as a packer and handler of such raisins; and admit that so far [fol. 112] as defendants know plaintiff presumably desires to continue such business. Admit that defendants will not market sub-standard raisins in competition with other raisins, and that they will not issue primary or secondary certificates to producers of raisins unless and until such producers have delivered 50% of their 1940 crop into the stabilization pool and 20% into the surplus pool. Allege that a substantial portion of the raisins delivered to the stabilization pool have already been disposed of. Except as herein otherwise expressly admitted and alleged, defendants deny each and every averment contained in paragraph VI of said first amended complaint.

VII

Deny each and every averment contained in paragraph VII of said first amended complaint.

VIII

Allege that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the average annual tonnage of raisins grown by plaintiff is 200 tons, that plaintiff expects to continue pro-

ducing such an annual tonnage for many years in the future and that defendants will continue said program in force for many years in the future unless enjoined; and other than as herein alleged, defendants deny each and every averment contained in paragraph VIII of said first amended complaint.

IX

Deny each and every averment contained in paragraph IX of said first amended complaint.

X

Admit that defendants will to the best of their ability, [fol. 113] unless restrained, endeavor to enforce and procure the enforcement of all of the provisions of the Agricultural Prorate Act and of the proration program for raisins thereunder against plaintiff and all other persons subject thereto by all of the means provided by law; and other than as herein expressly admitted, deny each and every averment contained in paragraph X of said first amended complaint.

XI

Deny each and every averment contained in paragraph XI of said first amended complaint.

XII

Allege that as of January 22nd, 1941, there had been delivered into said stabilization and surplus pools 107,587 tons of 1940 crop raisins produced in said zone; and other than as herein expressly alleged, deny each and every averment contained in paragraph XII of said first amended complaint.

XIII

Admit the averments contained in paragraph XIII of said first amended complaint.

And for a further and first affirmative defense defendants allege as follows:

XIV

That plaintiff is estopped to attack the constitutionality and to attack the validity of the Agricultural Prorate Act and of the proration program for raisins thereunder and of the seasonal program for 1940-1941, and each of them,

in that said plaintiff ever since the institution of such a proration program for raisins on or about August 4th, 1937, a copy of which program is attached hereto marked Exhibit "A", hereby referred to, and made a part hereof, has dealt [fol. 114] with defendant, Raisin Proration Zone No. 1, and the other defendants named herein, and has voluntarily participated in such proration program for raisins and has received and accepted the benefits thereof and has voluntarily applied for and received and accepted primary and secondary certificates for his raisins thereunder and has had and claimed the benefit of the operation of the proration program for raisins and of the Agricultural Prorate Act, and each and all of the provisions thereof.

And for a further and second affirmative defense, defendants allege as follows:

XV

That plaintiff is barred by the provisions of Section 17 of the Agricultural Prorate Act of the State of California from prosecuting this action and from prosecuting any and all alleged causes of action set forth herein, in that, each and every order and action of the defendants, or any of them, herein complained of became effective more than thirty (30) days prior to the commencement of this action.

And for a further and third affirmative defense, defendants allege as follows:

XVI

That plaintiff is guilty of laches in the commencement and prosecution of this action, and both thereof, in that Raisin Proration Zone No. 1 was instituted on or about August 4th, 1937, and has continuously operated since said time and that on said date a proration program for raisins was instituted and approved under and pursuant to the pro- [fol. 115] visions of the Agricultural Prorate Act of the State of California, which said program as amended and altered, has been in effect ever since said date. That in the operation of said program and of said zone defendants have set up an office and staff and have incurred expenses and obligations and entered into contracts and have procured a loan from the Commodity Credit Corporation of the United States, a Federal lending agency, of approximately $8,000,000.00 for the benefit of the producers of raisins in

said zone, and have paid and disbursed to such producers a major portion of said amount, and that plaintiff has at all times since August 4th, 1937, had knowledge of the operations and activities carried on and undertaken by defendants in connection with said Raisin Proration Zone No. 1 and said program and has had knowledge of the terms of said proration program for raisins, and has since said date stood by while defendants have operated said zone and said program at the expense of the raisin producers within said zone who have paid the cost of this operation in accordance with the terms of the raisin proration program and of said Agricultural Prorate Act, and that defendants have had to employ and train and have employed and trained a substantial personnel for the operation and administration of said program, and now have a substantial investment in the necessary facilities purchased and developed for such operation and administration, and that if such defendants are prevented from continuing the operation and administration of said program and of said zone, such investment will be a loss and large numbers of employees will be deprived of work, and the raisin industry and the producers of raisins in said zone and the people of the State of California at large [fol. 116] and the said Commodity Credit Corporation will suffer irreparable damage and untold injury and hardship.

And for a further and fourth affirmative defense, defendants allege as follows:

XVII

That the California Agricultural Prorate Act and the proration program for raisins thereunder as set forth in Exhibit "A" attached hereto, and the seasonal marketing program for 1940-1941, and each thereof, operate upon the harvesting and preparation for market of raisins prior to the time that any shipment and commerce takes place or begins and before any movement whatsoever of said raisins in either intrastate or interstate commerce. That neither the said Act nor the said program in any manner whatsoever burden, obstruct, or hinder interstate commerce in raisins but that the same benefit, foster and materially help interstate commerce and tend to increase the ultimate movement of raisins and the amount thereof in such interstate commerce and to regulate an even flow and movement thereof in such interstate commerce, and particularly that by rea-

son thereof dealers and consumers in states other than California, as well as in California, know that at all times there is on hand and available an ample regulated supply of good wholesome raisins of "standard" quality and grade free from impure and substandard fruit. That Federal statutes provide for the fostering and benefit of interstate commerce by cooperation with State officials in the regulation of agricultural surpluses and for loans to assist in taking care of such surpluses and that the Federal Government has recognized the benefit and help to interstate commerce [fol. 117] of the said proration program for raisins and that for the purpose of assisting in said program and thus benefiting and fostering interstate commerce in raisins the Commodity Credit Corporation, a Federal lending agency, has entered into an agreement with defendant, Raisin Proration Zone No. 1, to loan approximately $8,000,000.00 to said zone for distribution to the producers of raisins therein upon their compliance with the terms of the said raisin proration program, and that such money has actually been loaned and a major portion thereof distributed to such producers. That a surplus of raisins exists and has existed at all of the times herein mentioned, and that such surplus is and has been at all of such times of such extent and amount as to threaten and endanger the producers of raisins in California with ruin and bankruptcy.

Wherefore, defendants pray judgment that plaintiff take nothing by his first amended complaint herein, and that defendants recover their costs and disbursements herein, and for such further and other relief as to the court shall seem proper.

Earl Warren, Attorney General of the State of California, by Walter L. Bowers, W. R. Augustine, Gilbert F. Nelson, Deputies Attorney General, 903 [fols. 118-161] State Building, Los Angeles, California, Tele: Madison 1271, Attorneys for W. B. Parker as Director of Agriculture, Agricultural Prorate Advisory Commission, and the members thereof; J. C. Harlan. Strother P. Walton, 407 Pacific Southwest Building, Fresno, California, Telephone: 2-9918, Attorney for defendants Raisin Proration Zone #1; Program Committee of Raisin Proration Zone #1 and the members thereof; W. J. Cecil.

(Exhibit "A" to answer omitted in printing. See exhibit 1 of statement as to jurisdiction.)

[File endorsement omitted.]

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[fol. 162] JOINT EXHIBIT

IN DISTRICT COURT OF THE UNITED STATES.

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed April 11, 1941

The parties hereto hereby stipulate to the following facts:

1. That defendant and cross-complainant, Raisin Proration Zone No. 1, hereinafter sometimes referred to as the "Zone", is and has been since August 3, 1937, a Proration Zone organized and existing pursuant to the provisions of the Agricultural Prorate Act of the State of California, (Chapter 754, Statutes of 1933, as amended) for the purpose of applying the provisions of said Agricultural Prorate Act to an agricultural commodity, to-wit, raisins, being unbleached, sun-dried or partially sun-dried grapes of the [fol. 163] Thompson Seedless, Sultana, and Muscat varieties grown and produced in the said Zone, consisting of the Counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings and Kern within the State of California.

2. That there are approximately 240,000 acres in said Zone devoted to the growing of grapes utilized wholly or in part for the manufacture of raisins, which acreage is held and operated by approximately 10,000 producers, the average individual holding of each producer being about 25 acres.

3. That the average annual production of such natural sun-dried Thompson Seedless, Sultana and Muscat raisins within said Zone during the five year period, 1935-1939, inclusive was approximately 205,600 tons. The yearly production over the period 1935-1940, inclusive has been approximately as follows:

| | | |
|---|---|---|
| Year | 1935 | 177,000 Tons |
| " | 1936 | 164,000 " |
| " | 1937 | 222,000 " |
| " | 1938 | 256,000 " |
| " | 1939 | 209,000 " |
| " | 1940 | 158,000 " |

That during said five year period, 1935-1939, the distribution of such raisins in normal trade channels has averaged approximately 185,000 tons annually.

4. The producer of grapes is generally either the owner or the lessee of the land upon which the grapevines are located. He plants, cultivates, irrigates, sprays, and tends the vines upon which the grapes are grown and when ready picks the same. Such grapes may be sold as fresh fruit or for wines or prepared as raisins, and the amount utilized for these different purposes varies considerably from year to year both in the aggregate and with the individual producers. The producer picks the bunches of grapes to be utilized for raisins and spreads them on trays laid between the rows of vines, turns the trays from time to time, and finally dumps the dried contents into sweat boxes or picking boxes. The producer grades the same for quality and to eliminate sub-standard and inferior raisins and sometimes leaves this to be done for him by the packer [fol. 164] before the latter takes delivery. When the producer is ready to deliver his raisins, he hauls the same, or employs independent truckers to haul the same, in sweat boxes or picking boxes to the packing plant, or in some cases the packer calls and takes delivery of the same in the vineyard.

5. There are approximately forty packers of raisins within the State of California, all of whom have packing plants and places of business located within the Zone. They make all their purchases and take all their deliveries of raisins within the State of California.

6. All raisins sold by producers are sold to such packers in the State of California. Sale is completed when delivery is made and practically all sales are cash transactions, the producer receiving full payment for all raisins delivered immediately or within a ten day period.

7. When the raisins are delivered by producers to such packers, they are cured but have not been subjected to any

cleaning or other treatment. When delivered in such sweat boxes or picking boxes to the packer, the raisins are in clusters attached to the dried stems upon which they matured, except such as have fallen from said stems and have generally still attached a portion of the stem.

8. When the current crop of raisins is sold and delivered by the producers to the packers, the latter have on hand a substantial carry-over of raisins from the crop of the preceding year or two, which they endeavor to dispose of before selling the current crop. This carry-over is not held uniformly by the packers. The bulk of said carry-over is generally held among the larger packers. The balance is distributed among the smaller packers, although some of them carry over no inventory. The raisins received from [fol. 165] the producers are stored by the packers in containers upon the premises of the latter and are held by him in such containers for periods varying from a few days up to two years. The bulk of the raisins carried over for longer periods of time is carried over by the larger packers, some of the smaller packers carrying over no inventory from season to season. The packer at any time or at various times during this period removes the raisins from such containers and prepares the same for commercial sale and distribution to the public by cleaning, stemming, cap-stemming, seeding (muscats only), grading, sorting and packaging in various sized containers. This stipulation does not cover the treatment of Muscat layers.

9. When such raisins are so prepared for commercial sale and delivery, the packer delivers the same to jobbers, wholesalers, brokers, distributors, and dealers for resale and distribution to the public. Such raisins are ultimately consumed both within and without the State of California, but 90-95% of the raisins consumed as raisins, and for human consumption are ultimately consumed outside of the State of California.

10. That from the time of the delivery of raisins by the producer to the packer, as set forth herein, the preparation, care, handling, selling and distributing of such raisins is carried on by such packer and all subsequent purchasers and handlers independently of the producer and entirely free from any control or direction of such producer. That the raisins of the various producers delivered to any

packer are commingled and no producer has any knowledge of the subsequent movement or ultimate use or consumption of the particular raisins delivered by him and has no right, title or interest in any of such raisins after the sale [fol. 166] and delivery by him to the packer. This procedure is carried on by the packer independently of the producer of the raisins who has no knowledge nor means of knowledge as to the ultimate disposition of his particular raisins or as to whether the same ultimately move in intra-state or inter-state commerce, except that at times certain producer-packers ship some of their own production directly into inter-state commerce.

II. That a large percentage of the raisins produced within the Zone is sold and delivered to packers within ninety days after the start of the delivery season which ranges from September 15th to September 30th. Generally speaking, the producer of raisins is forced to sell and deliver his raisins during this period as soon as the raisins have been cured in order to procure funds with which to finance his operations and his succeeding crops. That some producers contract for the sale of their raisins several weeks in advance of the delivery of said raisins. That the holding and storing of raisins is usuallly done in the hands of the packer. That during the past several years the producers of raisins in the State of California have supplied a large surplus over and above the normal market demand therefor, and that there has been an excessive carry-over of raisins from year to year from the previous crop. That as of September 1, 1940, there was a carry-over of approximately 70,000 tons of raisins of the 1938 and 1939 crops in the possession of packers in the State of California. That for the past several years and at all times since the marketing program for raisins under the Agricultural Prorate Act became effective on August 3, 1937, there have been in the hands of packers large supplies of raisins in excess of the demand therefor and in amounts of not less than 30,000 to 40,000 tons more than such packers were able to sell and dispose of, and that such packers have been at all of such times abundantly able to [fol. 167] suppply all orders and demands for raisins, both from within and from without the State of California. That of such demand approximately 25% thereof came from for-

eign countries, and that such foreign demand has been practically eliminated since October of 1939. That during the past several years the Federal Government has sought to aid and alleviate the condition of the raisin industry in California by supplementing the normal demand and distribution with purchases by the Federal Surplus Commodities Corporation now the Surplus Marketing Administration of approximately 102,500 tons of raisins of the 1937, 1938 and 1939 crops—35,000 tons of which were of the 1939 crop.

12. That pursuant to the provisions of the Agricultural Prorate Act a proration program for raisins in said Zone was instituted August 4, 1937, and continued in effect until it was amended effective July 23, 1940, by the marketing program for raisins as amended, as set forth in Exhibit "A" attached to the Answer to First Amended Complaint herein, which program as thus amended ever since has been and still is in force and effect. That pursuant to the provisions of said program, as set forth in said Exhibit "A", and particularly under the terms of Article III thereof, a seasonal marketing program for raisins for 1940-1941 was duly and regularly adopted and approved effective September 7, 1940, which seasonal program is and has been ever since said date in force and effect in said Zone.

13. That the essential features of said 1940 seasonal marketing program for raisins, together with the financing arrangement, are as follows:

(a) That 20% by variety of all "standard" raisins of the 1940 crop produced within the Zone shall be delivered by the producers into a surplus pool; and that an advance shall be made to producers on such raisins at the time of delivery by such producers of $27.50 per ton for Muscat [fol. 168] and Thompson Seedless raisins, and $25.00 per ton for Sultanas, to be obtained from the proceeds of a non-recourse loan from Commodity Credit Corporation.

(b) That 50% by variety of all such "standard" raisins shall be delivered into a stabilization pool; and that an advance shall be made to producers upon such raisins at the time of delivery by such producers of $55.00 per ton for Muscat and Thompson Seedless raisins, and $50.00 per ton for Sultanas, to be obtained from the proceeds of said non-recourse loan from Commodity Credit Corporation.

(c) That the balance of such standard raisins, to-wit: 30% of each producer's standard raisins, may be disposed of by him without restriction into a primary channel of trade as "free tonnage", provided he has obtained a secondary certificate therefor, which certificate is issued to him when he has satisfied the pool requirements and upon payment of the certificate fee of $2.50 per ton for each ton of the "free tonnage" (30%) of his 1940 production of "standard" raisins.)

(d) That no "Sub-standard" or "inferior" grade raisins may be offered as "free tonnage" or delivered to the surplus or stabilization pools, but that such raisins shall be delivered into separate pools for disposal by the Program Committee at the best prices and under the fairest conditions obtainable for by-product purposes and that the net proceeds thereof shall be distributed ratably to the producers contributing to such pools.

14. That Commodity Credit Corporation is a corporation organized pursuant to the laws of the United States of America for the purpose of making loans upon agricultural commodities that are recommended by the Secretary of Agriculture of the United States and approved by the President of the United States. That prior to September 7, 1940, the defendants herein had been negotiating with the officers of said Commodity Credit Corporation for the [fol. 169] purpose of securing financial assistance for producers of 1940 crop raisins in the State of California. That subsequent to September 7, 1940, Commodity Credit Corporation executed a loan agreement with the Zone, by and under the terms of which Commodity Credit Corporation agreed to supply the funds for making the advances to producers set forth in the preceding paragraph hereof. That the existence of said Zone and the institution of said raisin program and the adoption and approval and operation of said seasonal marketing program constituted conditions precedent upon which such loan was made. That said loan agreement ever since has been and now is in full force and effect and has been performed by the parties thereto with certain minor modifications which have been made in said agreement relating to the mechanical details of operation, and which details the parties hereto do not consider of any materiality to the issues in this case. That

it was a condition of said loan agreement that each individual producer delivering raisins to the surplus and stabilization pools and desiring to avail himself of the nonrecourse loans provided by said agreement, should be required to execute in writing a producers' consent to pledge, by and under the terms of which the producer authorized the Zone and the Program Committee to pledge to Commodity Credit Corporation the raisins so delivered by him as collateral for said loans; the raisins delivered to one pool, however, not being pledged as collateral for any loan made upon raisins delivered to the other pool.

15. That pursuant to the provisions of the Agricultural Prorate Act and in accordance with the terms of the Raisin Program set forth in Exhibit "A" of the Answer to First Amended Complaint, and particularly Article X thereof, the Program Committee duly established and declared effective the grades and rules and regulations governing the same for "standard" raisins, which same became effective September 10, 1940, and ever since have been and [fol. 170] now are in force and effect. This in conjunction with the definitions in Article I of the Program set forth in said Exhibit "A" fixes the quality and grades for "standard", "sub-standard" and "inferior" raisins of the 1940 crop.

16. That plaintiff is and has been a producer of raisins in said Zone prior to and ever since the institution of a proration program for raisins therein on August 4, 1937. That as such a producer of raisins plaintiff has dealt with the defendant Raisin Proration Zone No. 1, and voluntarily participated in said program during the 1938 crop season year and applied for and received and accepted primary and secondary certificates for his raisins for such crop year. That during the year 1938, he was a producer only of raisins, but in the year 1939, he became a packer and since then has been and now is both a producer and packer of raisins. That no seasonal program for raisins was adopted for the crop year 1939, and no restrictions for said crop year were made under said program. That for the crop year 1940, the plaintiff did not apply — nor receive any primary or secondary certificates for his raisins and has refused to apply for the same, and has not participated in said 1940 seasonal program in any manner whatsoever.

That the 1938 seasonal marketing program for raisins differed from the 1940 seasonal program in that the 1938 seasonal program did not have a stabilization pool requirement, and had a 20% Surplus pool the same as the 1940 seasonal program.

17. That up to and including March 14, 1941, there had been delivered to the Surplus and Stabilization pools pursuant to the terms of said 1940 seasonal program for raisins an aggregate of 108,836 tons, of which 102,346 tons were of the Thompson Seedless variety, 4,948 tons of the Muscat variety and 1,542 tons of the Sultana variety. That of said [fol. 171] total tonnage 31,096 tons were delivered to the Surplus pool and 77,740 tons were delivered to the Stabilization pool. That said raisins were delivered by approximately 7,100 individual producers.

18. That pursuant to the terms of the 1940 raisin loan agreement with Commodity Credit Corporation there is available to producers upon the tonnage so delivered and covered by authorizations to pledge, an aggregate nonrecourse loan of $5,211,000.00. That as of March 14, 1941, $5,098,000.00 (amounting to 99.98%) had been actually disbursed to the producers delivering said tonnage, and that the balance was in process of being paid.

19. That as of March 14, 1941, the total deliveries of raisins into the two pools with the corresponding free tonnage of 46,644 tons, totals 155,480 tons. That the estimate for the total 1940 crop is 158,000 tons.

20. That as of the 28th day of March, 1941, packers had purchased from the Stabilization pool 49,455 tons of Thompson Seedless raisins, 1,100 tons of Sultana raisins and 3,075 tons of Muscat raisins, being approximately 70% of the total tonnage delivered into said Stabilization pool. That said packers purchased said raisins at a price of $60.00 per ton for Thompson Seedless raisins, $62.50 per ton for Muscat raisins and $55.00 per ton for Sultana raisins.

It is hereby stipulated that the foregoing, shall for the purposes of this case, be accepted and considered as a true and correct statement of the facts set forth herein, subject to the objections of any party hereto as to any portion or portions thereof as to the materiality, relevancy, and competency, and provided that any of the parties hereto may

augment or otherwise introduce evidence in addition thereto, but not contrary or contradictory to any of such facts. Nothing herein shall preclude the Court from exercising its [fols. 172-173] views as respects to judicial knowledge.

Dated: April 10, 1941.

Irvine P. Aten, Richard V. Aten, G. L. Aynesworth, Attorneys for Plaintiff. Earl Warren, Attorney General of the State of California, by Walter L. Bowers, M., Deputy, Strother P. Walton, Attorneys for defendants.

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[fol. 174] (Endorsed:) Filed Oct. 16, 1941. R. S. Zimmerman, Clerk. By R. B. Clifton, Deputy Clerk.

Copy

State of California, Legal Department

September 17, 1941.

Honorable Albert Lee Stephens, United States Circuit Judge; Honorable Campbell E. Beaumont, and Honorable Leon R. Yankwich, United States District Judges.

Re: No. 78—Brown vs. Parker.

GENTLEMEN:

We have received today a memorandum in the above entitled case from the court relative to the proposed Findings of Fact and Conclusions of Law. Using the plaintiff's proposed Findings as a basis, the court has indicated certain changes therein.

It is our belief that the Findings and Conclusions as thus modified still fall short of correctly and fully setting forth the material facts. We submit for your consideration the following proposed additional changes:

1. Finding I, page 3, lines 12-19 reads as follows:

"That the plaintiff on September 7, 1940, had orders for the delivery of sun-dried raisins produced in said zone in [fol. 175] the year 1940 which he could not fill without complying with the seasonal program for raisins hereinafter referred to, and that defendants in enforcing said program

have directly interfered with and obstructed plaintiff's said business and thereby damaged the plaintiff in a sum in excess of $3,000.00 exclusive of interest and costs, * * *"

Finding IX, as changed, page 9, lines 12-17 reads as follows:

"That plaintiff on September 7, 1941, (obviously should be 1940) had substantial orders for out of state delivery of raisins which he could not fill by purchase of 'free tonnage' and could not fill at all because of said pools without complying with said program; that defendants in enforcing said program have directly interfered with and obstructed plaintiff's said business. * * *"

[fol. 176] The two provisions above quoted are obviously to a considerable extent repetitive and seemingly can serve only for the purpose of unduly emphasizing certain of the statements contained therein. In addition, the two provisions are confusing in that in Finding I, the statement is that plaintiff had orders for delivery which he could not fill without complying with the seasonal program; whereas, in Finding IX the statement is that he had orders for *out of state* delivery which he could not fill by purchase of "free tonnage" and could not fill at all because of said pools. In connection with this latter Finding, we also again call attention to the fact that all of the orders introduced by plaintiff called for delivery within the state and to the best of our belief there was no evidence whatsoever of any orders calling for out of state delivery.

Furthermore, we believe that the Finding that plaintiff had orders which he could not fill by purchase of "free tonnage" raisins is directly contrary to the evidence. Plaintiff testified that there were 20,000 tons sold by the producers of the 1940 crop in September, 1940, either prior to [fol. 177] or subsequent to September 7 (Rep. Tr. p. 51, lines 16-25.) The true answer appears to be from his testimony that he was unable to buy them because of the fact that he refused to pay the market price but offered less than that. (Rep. Tr. p. 53, lines 4-12; p. 56, lines 14-20.) We feel that the correct Finding on this would be as set out in our proposed Finding XVI as follows:

"That plaintiff on September 7, 1940, had substantial orders for delivery of raisins which he could not fill without

complying with said seasonal program and without paying therefor the prevailing market price."

Finding I also contains the statement on page 3, lines 18 and 19, as follows:

"And thereby damaged the plaintiff in a sum in excess of $3,000.00, exclusive of interest and costs. * * *"

This is not in response to any issue in this case. There is a specific Finding of irreparable damage upon which to base the injunction and also a Finding that the matter in controversy exceeds the sum of $3,000.00. The only [fol. 178] possible effect of the foregoing statement in these Findings would be to serve as a persuasive argument upon another court in an action for damages that this court had already established the fact that plaintiff had sustained damages in excess of $3,000.00.

2. Finding III, as changed by the memorandum of the court in adding at the foot thereof the following:

"That said seasonal program is correctly set out in answer to the first amended complaint on file herein as Exhibit A thereof."

is incorrect and apparently the Finding fails to recognize the distinction between the basic proration program and the seasonal proration program. The basic proration program, as amended effective July 23, 1940, is the one set out as Exhibit "A" of the answer to the first amended complaint, and continues in effect until terminated or otherwise changed or modified. The seasonal proration program is for the season of 1940-1941, and is adopted in accordance with the provisions of the basic proration program and in this instance became effective September 7, 1940, and the essential features of such *seasonal* program are set forth in Finding IV.

[fol. 179] We believe that if the court will examine defendants' proposed Finding III, it will be found that this correctly and accurately sets forth the institution and the effective date and the differentiation between these two programs; and it will be further found that our Finding III follows the Stipulation of Facts as set forth in Paragraph 12 thereof on page 6, and we therefore feel that our

Finding III should be substituted for the proposed Finding III of the plaintiff as modified by the memorandum of the court.

3. In connection with Finding IV, we call the attention of the court to Paragraph 4 of our letter of September 8, 1941, relative to these Findings. Pages 6 and 7 of plaintiff's proposed Finding quoting from certain provisions of the basic program set forth as Exhibit "A" in the answer is surplusage and merely serves to burden the record, unless the purpose thereof be to restrict the injunction as against the enforcement of these specific provisions of the program.

4. Finding V contains the statement that 95% of the naturally dried raisins consumed in the United States are produced in said zone and that 95% of such raisins produced [fol. 180] in said zone are consumed outside the State of California. This Finding follows the language of Paragraph V of the first amended complaint, and these allegations are specifically denied by Paragraph V of the answer to such first amended complaint. As far as our search of the record shows, there is not one iota of evidence in support of this first statement that 95% of the naturally dried raisins consumed in the United States are produced in said zone. The record seems to be completely devoid of any evidence of any kind upon this allegation.

In regard to the statement that 95% of the raisins produced in said zone are consumed outside the State of California, the only evidence upon this appears to be the attempt to introduce a letter from the Giannini Foundation stating "that about 95% of the California raisins are shipped out of the State for consumption." The court at the time indicated that this matter was covered by the Stipulation of Facts and objection was made to the introduction of this letter. It was marked Exhibit 6. Upon our objection it was allowed for identification only and was never received in evidence. (Rep. Tr. p. 15, line 2 to p. 16, [fol. 181] line 9.)

As indicated by the court at the time, this was covered by the Stipulation of Facts, Paragraph 9, page 4, lines 18-22, reading as follows:

"Such raisins are ultimately consumed both within and without the State of California, but 90-95% of the raisins

consumed as raisins, and for human consumption are ultimately consumed outside of the State of California."

This was covered in defendants' proposed Finding XII, page 10, lines 24-27. We do not believe that there is any valid ground for deviating from the language of the Stipulation of Facts in making this Finding, and in this connection we would urge that our Finding XII be substituted in entirety for the plaintiff's proposed Finding V.

5. We again earnesly urge our objections to plaintiff's proposed Finding VII. Presumably one of the most material issues in this proceeding is the exact manner in which the raisins are handled from their incipiency until they are ultimately consumed. Accordingly, we believe that defendants are entitled to a Finding full and accurate on this [fol. 182] matter. The Stipulation of Facts contains a detailed statement covering this in its entirety. Finding VII, however, entirely ignores the Stipulation of Facts and is not supported by any other evidence. We believe that the only evidence touching this subject outside of the Stipulation of Facts is that given by Mr. Chaddock, page 152, line 13 to page 153, line 4 of the Transcript. This, however, was confined entirely to Muscat layers which constitute less than 10% of the raisins produced. Finding VII, however takes this statement made regarding Muscat layers only and applies it to all raisins and eliminates the statement used in the Stipulation of Facts. We urge that defendants' proposed Finding X which follows the language of Paragraph 4, page 2 of the Stipulation of Facts, should be substituted for plaintiff's proposed Finding VII.

Finding VII contains the further statement that the grapes when thus dried in the vineyard are "a wholesome food and sound article of commerce." We maintain that this Finding is entirely contrary to the facts and that there is not the slightest bit of evidence to support the same. It may be that they are edible but all one has to do is to [fol. 183] look at defendants' Exhibits "B" and "C" showing the amount of dirt, chaff, sand, stems and waste removed from the raisins as they come from the vineyard before they are delivered to any purchaser for actual consumption to become convinced beyond peradventure of a doubt that in the condition when taken from the vineyard they are anything but a "wholesome food." Of course, a load of the sand and dirt removed from the raisins might in

itself be a sound article of commerce. The fact remains that the raisins as taken from the vineyard are a raw product and never move in interstate commerce until they have been converted by processing or whatever term may be used into a finished product. Paragraph 7, page 3 of the Stipulation of Facts, states that: "When received by the packer in such condition, the raisins are not the subject of trade or commerce except in the transaction between the producer and packer as hereinabove described, and in occasional sales from one packer to another." The testimony of Mr. Hines is that the raisins as taken from the vineyard are never sold to the trade or to consumers and never shipped anywhere nor put into the movement of interstate commerce. (Transcript p. 129, line 20 to p. 130, line 17.) The same witness stated that such raisins "are not fit for commercial [fol. 184] use until they have been stemmed and cleaned." (Rep. Tr. p. 132, lines 13, 14.)

To find that the raisins in this condition are "a wholesome food" carries the connotation that it is a marketable article in that condition and ready to be sold and consumed in the ordinary course of trade and commerce. The following colloquy from the record is eloquent of the fact that this is directly contrary to the actual facts (Rep. Tr. p. 120, lines 2-18):

"Judge Stephens: Mr. Aynesworth, the witness has said the same function is performed. That is the important thing; rather than the machinery that does it. Do you contend that a raisin can properly be produced for the market with any of these functions left out?

"Mr. Aynesworth: I will state this, and I believe this is correct: that they are marketing raisins all the time, that go into interstate commerce, without using anywhere near all the elements that the witness has testified to.

"Judge Stephens: It might all be done by hand, but the [fol. 185] function would still be there. In other words, they do have to be graded and washed——

"Mr. Aynesworth: And stemmed.

"Judge Stephens: And stemmed.

"Mr. Aynesworth: And packed.

"Judge Stephens: The sand has to be sifted away from them; they have to go through the fumigator, and so forth."

Instead of plaintiff's Finding VII which in itself and alone gives an entirely incorrect and erroneous impression,

we feel that defendants' proposed Findings X and XI should be substituted which follow the actual facts and the language of the Stipulation of Facts as agreed to by the parties.

6. What has been said relative to plaintiff's proposed Finding VII is applicable to his proposed Findings VIII and IX. Such Findings set out only a portion of the facts relative to the handling of the raisins. Defendants' proposed Findings X, XI, XII and XIII set this forth fully and with exactitude following the language of the Stipulation of Facts. As all of these steps may have an important bearing upon the determination of the question of whether [fol. 186] this is in violation of the interstate commerce clause of the Federal Constitution, we believe that such Findings as proposed by defendants are proper and should be adopted.

In addition, what we have said previously in commenting on plaintiff's proposed Finding I is applicable to his proposed Finding IX which contains substantially similar language. We again call attention to the fact that this Finding makes the statement that plaintiff had substantial orders for "out of state delivery of raisins" which we contend is directly contrary to the facts. Referring to the contracts in question, plaintiff's Exhibits 1, 3, 4, 8 and 9, it will be seen that they do not call for delivery out of the state, but within the state of California. The Stipulation covers the facts that from 90-95% of such raisins consumed as raisins for human consumption ultimately move out of the State of California. As a matter of fact, the plaintiff could not even testify that any of his raisins were to be shipped out of the state. In response to questions by Judge Stephens, he testified that he had no understanding with any of the parties to such contracts that they would ship the raisins out of the State [fol. 187] and that he did not particularly care whether they were shipped out or not. (Rep. Tr. p. 40, line 21 to p. 41, line 1.) It was stipulated that these raisins presumably took the same course as the average of all of the raisins and that under the Stipulation of Facts from 90-95% of the same consumed for human consumption would ultimately be shipped out of the State of California. Such, however, is a far cry from a Finding that the plaintiff had direct orders for out of state delivery.

7. Plaintiff's proposed Findings XI and XII use the words "said program". To avoid any question of uncertainty and to bring it within the issues of the pleadings the word "seasonal" should be inserted in each Finding just before the word "program."

8. We request that defendants' proposed Finding VI be adopted inasmuch as it is a copy of Paragraph 15 of the Stipulation of Facts and we consider it essential for the purpose of showing the establishment of the grading provisions.

9. We request that defendants' proposed Finding XIV be adopted. This follows exactly the language of Paragraph 11 of the Stipulation of Facts beginning with line 18 thereof [fol. 188] on page 5. We consider that the same is material as showing that at all times there was on hand in the State of California in the hands of the packers an abundance of raisins from which all requirements of interstate commerce were and could be filled and that in fact there was an excess surplus carried at all times.

10. In plaintiff's proposed Conclusion III, we believe that the word "seasonal" should be inserted before the word "program" in line 22, page 10, for the same reasons as above stated in inserting the same word in Findings XI and XII.

As said Conclusion III is drawn it restrains the enforcement of the entire seasonal program. If this is the intent of the court, there is of course nothing to be said on our part, but it was our understanding that the court intended to restrict only certain provisions of the program and especially that it was not intended to restrain the enforcement of the grading provision.

We submit the foregoing to the court for its consideration in accordance with its letter of September 16, 1941, transmitting the memorandum in regard to the proposed Findings.

Respectfully submitted, Walter L. Bowers, Deputy Attorney General.

WLB:GB.

[fol. 188-1] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

No. 78 Civil

PORTER L. BROWN, Plaintiff,

vs.

W. B. PARKER, Director of Agriculture, AGRICULTURAL PRORATE ADVISORY COMMISSION, RAISIN PRORATION ZONE #1, Program Committee, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, Preston McKinney, H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, W. J. Cecil, J. C. Harlan, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe and Eight Doe, Defendants

OPINION

Before Albert Lee Stephens, Circuit Judge; Leon R. Yankwich and Campbell E. Beaumont, District Judges

STEPHENS, Circuit Judge:

The plaintiff, who is a packer of raisins in the State of California, instituted this action to restrain the enforcement of a prorate program for raisins prescribed under the [fol. 188-2] authority of the California Agricultural Prorate Act (Chap. 754, Cal. Stats. 1933) as amended, hereinafter called the Act. He has alleged and we hold that he has proved that the issues involve a sum in excess of $3,000.00, in that the State of California is attempting to enforce the provisions of the Act and is claiming penalties in the amount of $13,000.00 against the plaintiff.

It is plaintiff's position that the program formulated under the Act is unconstitutional in that it prevents his purchase in open market for shipment in interstate commerce and that it constitutes a direct interference with interstate commerce in contravention of the provisions of the Federal Constitution.

The defendant Proration Zone No. 1 filed a cross complaint praying that the Act and program thereunder be declared a valid exercise of the police power of the State

of California, that the plaintiff be enjoined from refusing to comply therewith, and for an accounting and damages for his failure to comply in the past.

The case was tried before United States Circuit Judge Albert Lee Stephens and United States District Judges Leon R. Yankwich and Campbell E. Beaumont, sitting as a "three judge court" under the authority of 28 U. S. C. A. Sec. 380, and was submitted upon the question of the constitutionality of the program set up under the Act.[1]

[fol. 188-3] The raisin industry is an important one in California. It is uncontroverted that 95% of the naturally dried raisins consumed in the United States are produced in said Zone No. 1,[2] and 95% of such raisins produced in said zone are consumed outside the State of California. The stipulation of facts filed by the parties shows the following with reference to the customary manner in which the producers of raisin grapes in California, including Zone No. 1, operate:

"The producer of grapes is generally either the owner or the lessee of the land upon which the grapevines are located. * * * The producer picks the bunches of grapes to be utilized for raisins and spreads them on trays laid between the rows of vines, turns the trays from time to time, and finally dumps the dried contents into sweat boxes or picking boxes. The producer grades the same for quality and to eliminate substandard and inferior raisins and sometimes leaves this to be done for him by the packer before the latter takes delivery. When the producer is ready to deliver his raisins, he hauls the same, or employs independent truckers to haul the same, in sweat boxes or picking boxes to the packing plant, or in some cases the packer calls and takes delivery of the same in the vineyard. * * * All raisins sold by producers are sold to such

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[1] We have carefully considered the very recent case of Railroad Commission of Texas et al. v. The Pullman Co., et al., 61 S. Ct. 643, 85 L. Ed. (March 3, 1941) and have concluded that the principles therein treated do not apply to the issues of the instant case.

[2] Zone No. 1 was established pursuant to proceedings initiated under the Act, and includes an area composed of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings and Kern Counties in the State of California.

packers in the State of California. Sale is completed when delivery is made and practically all sales are cash transac- [fol. 188-4] tion, the producer receiving full payment for all raisins delivered immediately or within a ten day period.

"When the raisins are delivered by producers to such packers, they are cured but have not been subjected to any cleaning or other treatment. When delivered in such sweat boxes or picking boxes to the packer, the raisins are in clusters attached to the dried stems upon which they matured, except such as have fallen from said stems and have generally still attached a portion of the stem. * * *

"The raisins received from the producers are stored by the packers in containers upon the premises of the latter and are held by him (sic) in such containers for periods varying from a few days up to two years. * * * The packer at any time or at various times during this period removes the raisins from such containers and prepares the same for commercial sale and distribution to the public by cleaning, steaming, cap-stemming, seeding (muscats only), grading, sorting and packaging in various sized containers. * * *

"When such raisins are so prepared for commercial sale and delivery, the packer delivers the same to jobbers, wholesalers, brokers, distributors, and dealers for resale and distribution to the public.

"From the time of the delivery of raisins by the producer to the packer, as set forth herein, the preparation, care, handling, selling and distributing of such raisins is carried [fol. 188-5] on by such packer and all subsequent purchasers and handlers independently of the producer and entirely free from any control or direction of such producer. * * * No producer has any knowledge of the subsequent movement or ultimate use or consumption of the particular raisins delivered by him and has no right, title or interest in any of such raisins after the sale and delivery by him to the packer. This procedure is carried on by the packer independently of the producer of the raisins who has no knowledge nor means of knowledge as to the ultimate disposition of his particular raisins or as to whether the same ultimately move in intrastate or interstate commerce, except that at times certain producer-packers ship some of their own production directly into interstate commerce."

It will thus be seen that without any prorate provisions in the law, the plaintiff as a packer-dealer would be free to buy and would ordinarily buy the raisins which he boxes and sells in interstate commerce direct from the producer thereof and in amounts limited only by his desire or ability.

Under the Act after a prorate program has been formulated and approved by the commission,[3] the agent appointed to administer the program shall issue to the producers certificates as provided in the Act. These certificates are divided into primary and secondary certificates. Each producer shall be entitled to one primary certificate which identifies him as a "producer" under the terms of the Act. [fol. 188-6] The Act, Sec. 20, as amended, Statutes 1939, p. 1948, provides that "secondary certificates shall be numbered consecutively and shall be used to control the time and volume of harvesting or other preparation for disposal. Such secondary certificates shall accompany all deliveries of the prorated commodity by producers into a primary trade channel",[4] and it shall be unlawful for any prorated commodity to be delivered into a primary trade channel without the necessary secondary certificate therefor. It is also unlawful for any handler to receive or have in his possession without proper authority any such commodity. The Act contains a further provision that "in the case of commodities which are normally concentrated for preparation for market, the program committee may authorize harvesting of the entire crop for the purpose of delivery to a concentration point and subsequent marketing control."

The program formulated under the Act provides that 20% of all "standard"[5] raisins shall be delivered into

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[3] The Act creates an Agricultural Prorate Advisory Commission, and sets up procedure for the formulation of an Agricultural prorate marketing program.

[4] "Primary channel of trade" is defined by the Act to mean "that transaction in which the producer or his cooperative marketing association loses physical possession of the commodity through the sale thereof or other disposition commercially." St. 1935, p. 1527, Sec. 2(j).

[5] "Standard raisins" is defined by the Program to mean "raisins of a quality or grade which is equal to, or better than, the quality or grade for standard raisins as determined by the Committee * * *".

[fol. 188-7] a surplus pool,[6] the producers to be given an advance of $27.50 per ton for Muscat and Thompson Seedless raisins, and $25.00 per ton for Sultanas, the advance to be obtained from the proceeds of a non-recourse loan from the Commodity Credit Corporation, a federal agency.

Fifty percent of all standard raisins are to be delivered into a stabilization pool, the producers to receive an advance from the Commodity Credit Corporation funds of $55.00 per ton for Muscat and Thompson Seedless raisins, and $50.00 per ton for Sultanas.

The balance of 30% of standard raisins may be disposed of by the producer without restriction as "free tonnage" provided he has obtained a secondary certificate, which certificate is issued to him when he has satisfied the pool requirements and upon payment of a certificate fee of $2.50 per ton of such free tonnage.

It is provided that no substandard or inferior[7] grade of [fol. 188-8] raisins may be offered as free tonnage or delivered into surplus or stabilization pools, but such raisins are delivered into separate pools for disposal by the program committee at the best prices obtainable and under the fairest conditions obtainable for by-product purposes. The net proceeds are distributed ratably to the producers contributing to such pools.

Raisins in the surplus pool may be sold by the committee "as soon as practicable after delivery of the same to the committee * * * provided, however, that none of the standard raisins in such pool shall be sold or otherwise disposed of prior to January 1 of the marketing season in

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[6] The program provides for a determination annually of the marketing policy for the marketing season and for the salable, stabilization and surplus percentages to be applied. The stipulation of facts filed herein states the percentages given herein to be the essential features of the 1940 seasonal marketing program for raisins.

[7] "Sub-standard raisins" is defined by the Program to mean "raisins of a quality or grade below the quality or grade established by the Committee for standard raisins * * *," but which are not inferior raisins. "Inferior raisins" is defined to mean "raisins which are unfit for human consumption, as defined in the Pure Food and Drug Act of the United States of America, 21 U. S. C. A., sec. 1, et seq., as now in force or as hereafter amended."

which such pool is established". The Committee determines the prices at which the raisins shall be sold, but it is provided in the program that sales of surplus pool raisins shall be only for assured by-product and other diversion purposes, and that they shall not be sold into normal marketing channels.[8] There is a provision for transfer of raisins from the surplus pool into the stabilization pool in the event the original estimates were not in accord with later found facts and it later appears that an excessive quantity of raisins has been placed in the surplus pool.

As to the raisins in the stabilization pool, the program provides that they shall be sold by the committee "as soon as practicable after delivery of same to the committee, * * * [fol. 188-9] in such manner as to maintain stability in the markets and to dispose of such raisins". No sales of raisins from the stabilization pool shall be made at less than the prevailing market price for raisins of the same variety and grade on the date of sale. Stabilization pool raisins shall be sold only into normal marketing channels. There is a provision for transfer of raisins from the stabilization pool into the surplus pool in the event of an error in the original estimates of carry-over, etc. In the disposal of stabilization pool raisins "effort shall be made by the committee to effectuate sales in such fashion that the quantity of such stabilization pool raisins sold from time to time shall be coordinated as closely as possible with market demands therefor." (quotation from Program.)

The producers of the raisins have a limited equitable interest in the raisins in the surplus and stabilization pools, calculated upon a pro rata basis in accordance with the tonnage of each such producer, with adequate and proper differentials for variety and grade, and less deductions for advances made by the committee to such producer.

It will be seen that with the Act and program thereunder in operation, the plaintiff as packer who contracts for delivery of a very large percentage of the raisins he handles directly into interstate commerce, cannot freely purchase raisins directly from the producer, for, except as to the [fol. 188-10] "free tonnage" raisins, he must make his purchase from the Zone representatives under restrictions

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[8] "Normal marketing channels" is defined to mean "those merchandising channels through which handlers customarily dispose of raisins for human consumption as raisins."

herein mentioned, and as to the 30% free tonnage he must make his purchases only when the raisins are accompanied by the secondary certificate showing full compliance with the program.

There is in evidence a copy of the "Stabilization Pool Sales Policy" set up by the Zone Agent, which recites that the Program Committee reserves the right to determine the eligibility of packers to purchase stabilization pool raisins, and that in order to be eligible to purchase raisins from the committee a packer must be completely current in respect to payment of secondary proration certificate fees. Another item taken into consideration in the determination of eligibility to purchase raisins is whether or not there has been complete proration of all raisins in the packer's possession or on his premises.

It comes to this, that the plaintiff cannot, without violating the provisions of the program, purchase any raisins for his interstate or intrastate business from a grower who does not have the certificate showing his full compliance with the program, and the evidence is clear that plaintiff took orders for out-of-state delivery which he could not fill by purchase of so-called "free tonnage" raisins and could not fill at all because of the program pool without complying with the program. Nor can he under the regulations prescribed by the Program Committee purchase any raisins deposited in the stabilization pool if he [fol. 188-11] has on his premises or in his possession any raisins that are not accompanied by the certificate showing proration by the grower thereof.

Plaintiff in support of his position that the program formulated under the Act is unconstitutional as a direct interference with his shipping raisins in interstate commerce, cites the case of Mutual Orange Distributors v. Agricultural Prorate Commission of the State of California, D. C., 35 Fed. Supp. 108, recently decided by a three judge court sitting in this District but with different District Judges sitting with the Circuit Judge, and defendants seek to distinguish the case on the facts. Notwithstanding its title this cited case has nothing to do with oranges, but is concerned solely with the prorate program for the marketing of lemons. This case will be referred to as the "lemon prorate case". We are of the opinion that notwithstanding factual differences in the two cases, each of them brings very similar principles to bear upon the issues.

Defendants' point of alleged distinction seems to be that in the lemon prorate case the prohibition was on the producers of lemons selling their product in interstate commerce without the secondary certificates provided for in the Act. The lemon proration program prorated among all growers in the State the lemons which could be marketed in primary trade channels. The custom of lemon growers was to sell direct to the trade out of the state. In the [fol. 188-12] instant case the custom of the trade is for the producer of raisin grapes to sell the cured raisins to packers within the state, and the packers in turn sell to jobbers and wholesalers for distribution to the consuming public. The prohibition is on the grower from selling, and the packer from buying raisins on which a secondary certificate has not been issued. The argument is that this is an intrastate transaction, and therefore the program attaches before the raisins have entered interstate commerce, and that it cannot be said that the program constitutes a direct interference with interstate commerce.

Championing the constitutionality of the program the defendants invoke the principle that a State may legally use its police power in the interest of the welfare of its people, even to the extent of affecting interstate commerce. This principle, with its limitations, was discussed by the Supreme Court in Simpson v. Shepard, 230 U. S. 352, 399, in the following language:

"The power of Congress to regulate commerce among the several states is supreme and plenary. • • • The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide effective regulation of that intercourse as the national interest may demand. • • •

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. • • •

[fol. 188-13] "Thus the states * * * have no power to prohibit interstate trade in legitimate articles of commerce (citing cases). * * *"

In Lemke v. Farmers Grain Co. of Embden, 258 U. S. 50, 42 S. Ct. 244, 66 L. ed. 458, the Supreme Court had under consideration the constitutionality of a state statute which required purchasers of grain to obtain a license and pay a license fee, and to act under a defined system of grading, inspection and weighing. The defendants in that case, as in the instant case, relied upon the principle that a state may make local laws under its police power which may stand until Congress takes possession of the field under its superior authority to regulate commerce among the States. The Supreme Court rejected the defendants' argument, stating (258 U. S. page 59, 42 S. Ct. page 247, 66 L. ed. 458),

"This principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it."

The Court reaffirmed its decision in Simpson v. Shepard, supra, and applying the principles laid down in that case, held that the statute under consideration was unconstitutional in that it denied the privilege of engaging in interstate commerce *except to dealers by state authority.* And in United Leather Workers International Union v. Herkert Meisel Trunk Co. 265 U. S. 457, (p. 467) 44 S. Ct. 623, 68 L. ed. 1104, 33 A. L. R. 566, the Supreme Court said the statute under consideration in the Lemke case was a direct limitation on interstate commerce.

In Grandin Farmers' Co-op Elevator Co. v. Langer, Dist. Co. No. Dak. SW Div., 1934, 5 Fed. Supp. 425, affirmed without opinion, 292 U. S. 605, 54 S. Ct. 772, 78 L. ed. 1467, the state statute under consideration declared an embargo on its wheat when prices became so low as to become confiscatory. The Court said (5) F. Supp. page 427),

[fol. 188-14] "The state has no power to interfere directly with interstate commerce, regardless of economic conditions. The regulation of such commerce is a matter of national concern. * * * If one state or all the states could place embargoes upon the export of the products of their mines, forests, fields, and oil wells, an inconceivable con-

dition of national insecurity would follow. * * *

"A state statute, which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibitive regulation and invalid, regardless of the purpose for which it was enacted. (citing cases.)"

We think the case of Champlin Refining Co. v. Corporation Commission of Okla., 286 U. S. 210, 52 S. Ct. 559, 76 L. ed. 1062, 86 A. L. R. 403, although sometimes asserted as such, is not authority for the contention that practically unlimited proration of a state's product is within the power of the state. In that case the Supreme Court had under consideration a state statute which curtailed *production* of oil *to prevent waste*. It was there held that production of oil is a mining operation and not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce.

In considering the Champlin Refining Co. case, supra, the case of West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. ed. 716, 35 L.R.A., N.S., 1193, should also be taken into consideration. In the West case the state act prohibited foreign corporations from laying pipe lines across highways and transporting natural gas therein [fol. 188-15] to points outside the state. It further provided that domestic corporations must transmit gas only between points in the state, and shall not transport or deliver gas to corporations or persons engaged in transporting or furnishing gas to points outside the state. In holding this statute unconstitutional, the Court distinguished between the police power of the State to regulate the *taking* of a natural product, such as natural gas, from its natural placement, and prohibiting that product from transportation in interstate commerce after removal from its natural placement, saying that the former is within, and the latter beyond, the power of the State. It is stated that gas, *when reduced to possession*, is a commodity and belongs to the owner of the land. It is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. A state statute which attempts to prohibit its being a subject of interstate commerce is unconstitutional.

In the light of the broad grant of power given Congress over interstate commerce and the principles laid down by the Supreme Court as herein outlined, the necessary effect

upon interstate commerce of the raisin prorate program [fol. 188-16] must be scrutinized, and this with the principle in mind that one challenging the validity of a state enactment is not necessarily bound by the legislative declarations of purpose. It is open to him to show that the practical operation of the statute or of any program devised under the authority of such statute directly burdens or effectively prevents the free flow of interstate commerce. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1., 49 S. Ct. 1, 73 L. ed. 147.

It may here be stated that the inhibition of the program is not based upon crop limitations or upon the health of the consumer or protection of the industry through exclusion from the market of unfit fruit. Such cases as Sligh v. Kirkwood, 237 U. S. 52, 32 S. Ct. 501, 59 L. ed. 835, are not in point. And it is not based upon false labeling or deceptive packaging. Neither is it a statute regulating proper conditioning of the commodity prior to its being offered to the consumer. Nor is it a limitation upon submitting ripe grapes to a proper process whereby the grape becomes a marketable raisin. The stipulation itself speaks of the sun dried grape as a "raisin" before it is removed from the vineyard and before it is stemmed, cleaned, or packaged.

No facts, claims or argument in this case have been related to the part of the program designated "Green Diversion". There have been no steps taken to change the production of raisins in quantity either above or below the growers' own judgment or desire. We are constrained [fol. 188-17] to hold and do hold that the production of raisins is complete when the grapes dry and cure into raisins. This natural process of drying and curing takes place on the premises where the grapes are grown, and is accomplished without the intervention of anyone either in cooperation or otherwise with the producer (farmer, grower). When the grapes are so dried and cured they are substantially ready for market as raisins. The process of stemming, cleaning, etc. which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater demand for them in the market, but is not essential to production. It is our opinion that the prorate program as presented in this case does not attach to or impinge upon "production".

Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. ed. 1210 is cited as authority for the constitutionality of

the Act and program thereunder. There a State statute fixing reasonable maximum charges for the services of warehousemen handling tobacco was held constitutional.

The following quotations from the Yeomans case indicate how widely different the state regulation there concerned is from the one before us:

"* * * we find no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sales or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy." 301 U. S. page 455, 57 S. Ct. page 849, 81 L. ed. 1210. (Italics the Court's.)

[fol. 188-18] "(quoting from Cargill Co. v. Minnesota, 180 U. S. 452, 470, 21 S. Ct. 423, 45 L. ed. 619) 'The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it is purchased.'"

301 U. S. page 457, 57 S. Ct. page 850, 81 L. ed. 1210.

"Here, the Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers."

301 U. S. page 459, 57 S. Ct. page 850, 81 L. ed. 1210.

While it is true that the program purports merely to prevent and regulate the sale of raisins to the packer under the universal custom of his cleaning, stemming and packaging them within the State, the raisins on the producing premises and those stored by the program committee are at all times kept from market except through the operation of the program. It is impossible to avoid the conclusion that the purpose and necessary effect of the program is to place a controlled embargo on the State's raisin production, in order to effect and stabilize prices. It seems clear to us that the program is frankly and simply a means of controlling the supply of raisins into interstate trade channels

to meet the market demands. As to this purpose it is not in our province to comment. We think the State has attempted to accomplish this result by a process which impinges upon a grant of power to the Federal government. The following quotation from the Program is illustrative:

"Secondary Certificates shall be issued to control the time and volume of movement of salable raisins into the primary channels of trade." (Article XI, Sec. 1 (b))

The Program gives the Committee the power to sell the pooled raisins "in such manner as to maintain stability [fol. 188-19] in the markets", and provides that no sales "shall be made at less than the prevailing market price for raisins of the same variety and grade on the date of sale", and "effort shall be made by the committee to effectuate sales in such fashion that the quantity of such stabilization pool raisins sold from time to time shall be coordinated as closely as possible with market demands therefor".

The "Stabilization Pool Sales Policy" set up by the Committee provides for opening prices ranging from $55.00 per ton for Sultanas to $60.00 per ton for Thompson Seedless Raisins. It is stated "Notwithstanding anything herein to the contrary, the above opening prices will not be reduced by the sales policy committee of the Surplus Marketing Administration within sixty (60) days from the effective date hereof (Jan. 1, 1941)."

In a printed communication sent out by the Proration Program Committee to the raisin producers within the zone, it is stated that the program "* * * was based upon the idea * * * that a large part of the 1940 crop should be placed in pools under Committee supervision to prevent a flooding of the few available markets, with the inevitable price decline which goes with flooded markets."

By every authority of our acquaintance the enforcement of the implementing program under the Act constitutes a direct and illegal interference with interstate commerce. [fol. 188-20] It is no answer in principle to say that under the terms of the program 30% (free tonnage) of produced raisins are available for the open market. This percentage is fixed by the program as best calculated to serve its purposes, it might be 15% of the crop or none at all. The vice of the situation is that the program requires the submission

of any properly marketable part of the crop to its terms, all of which are directed to the control of the commodity into commerce. It is the judgment of the program administrators that such purpose will be advanced with the freeing of 30% of the crop at the beginning of the 1940-1941 season's market. After the release of the 30% free tonnage the amount of raisins which may be released for absorption by the market equated from the pool is also wholly within the judgment of the prorate authorities.

We are reminded of Mr. Justice McKenna's illustration in the case of Heisler v. Thomas Colliery Company, 260 U. S. 245, 43 S. Ct. 83, 84, 67 L. ed. 237, wherein he sustains the State's right to a tax on coal "washed or screened, or otherwise prepared for market" and remarks that if the subject matter is under Congressional jurisdiction because the coal will enter interstate commerce "The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West, etcetera." But, on the other hand, if the State of California has the power to execute a control plan of its entire fruit crop and permit it to enter the market for consumption only as and when [fol. 188-21] its administrators adjudge proper, then every state can so control all industries and crops within its boundaries by the same token. This presents a condition certainly no less repugnant to our dual system of State and Federal government than that illustrated by Mr. Justice McKenna, a condition in the situation confronting us which the constitutional fathers sought to guard against by writing the commerce clause into the Constitution itself. (see hereinbefore quoted portion of the opinion in the case of Grandin Farmers' Co-op Elevator Co. v. Langer, supra.) In our opinion the State has ventured upon a sphere of governmental activity which impinges upon a constitutional provision which the framers of the Constitution recognized as necessary to the national status of the several states in their Union.

It is our duty to declare the law as we see it. We cannot however fail to appreciate the economic effect of our decision in this case. It may not be out of place therefore to mention here the highly fortunate circumstance that there is federal law and administrative machinery available by

which a proper and legal proration of the raisin crops may be accomplished if such is generally held to be desirable.

The petition for a decree permanently enjoining the defendants from enforcement of the raisin prorate program hereinbefore referred to is granted. The relief sought by defendants in their cross complaint is denied. Plaintiffs may draw findings of fact and conclusions of law in conformity with the expressions of this opinion.

[fol. 188-22] In view of the fact that the case was submitted solely on the question of the constitutionality of the program, we do not consider the defenses of estoppel and the statute of limitations raised by the defendants in their pleadings.

[fol. 188-23] DISSENTING OPINION

"Yankwich, District Judge (dissenting).

"The control of the Congress over interstate commerce, United States Constitution, Art. I, Sec. 8, Cl. 3, being absolute, any direct interference with it by any State must give way. But this Congressional primacy does not stand in the way of regulations by the States, through the exercise of their taxing or police powers, which, although local in their nature, affect interstate commerce. See The Minnesota Rate Cases, 1913, 230 U. S. 352, 399, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A., N. S., 1151, Ann. Cas. 1916A, 18; Milk Control Board v. Eisenberg Farm Products, 1939, 306 U. S. 346, 351, 59 S. Ct. 528, 83 L. Ed. 752; United States v. Rock Royal Co-Op., 1939, 307 U. S. 533, 569, 59 S. Ct. 993, 83 L. Ed. 1446; Mulford v. Smith, 1939, 307 U. S. 38, 48, 59 S. Ct. 648, 83 L. Ed. 1092.

"In a recent case (California v. Thompson, 1941, 61 S. Ct. 930, 932, 85 L. Ed. ——), Mr. Justice Stone has stated the extent of compatibility of state regulation with national supremacy in the field of interstate commerce in these words:

" 'As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412, and Cooley v. Board of Port Wardens,

12 How. 299, 13 L. Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate com- [fol. 188-24] merce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in Di Santo v. Pennsylvania, supra, 273 U. S. (34) 40, 47 S. Ct. 267, 71 L. Ed. 524'.

"When we consider Congressional regulation of interstate commerce, we must, as students of late juristic trends, concede that recent decisions, such as those sustaining the National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq. (National Labor Relations Board v. Jones-Laughlin Corp., 1937, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352) and the Fair Labor Standards Act, 29 U. S. C. A. Sec. 201 et seq. (United States v. Darby, 1941, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. ——, 132 A. L. R. 1430), extend the power of the Congress to dominate purely local conditions, through the exercise of its absolute control over interstate commerce.[9]

[fol. 188-25] But this *does not mean* that because a product is destined for interstate commerce, or a business aims at interstate commerce, it is, *by this very fact*, without the ambit of state regulation. Carriers or persons engaged in transportation in interstate commerce may be subjected to many state regulations. See their enumeration

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[9] These decisions overrule all the cases, such as Hammer v. Dagenhart, 1918, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724, and Carter v. Carter Coal Co., 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, which, if followed, would have made it impossible for the Congress to influence, by indirect regulation, industrial relations within state confines.

by Mr. Justice Stone in California v. Thompson, 1941, 61 S. Ct. 930, 85 L. Ed., ——. So, also, may the taxing power of a state be used to tax products originating in, or intended for, interstate commerce, either before leaving the state or after reaching it. See Henneford v. Silas Mason Co., 1937, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; Ford Motor Company v. Beauchamp, 1939, 308 U. S. 331, 60 S. Ct. 273, 84 L. Ed. 304; Felt & Tarrant Manufacturing Co. v. Gallagher, 1939, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; Pacific Tel. & Tel. Co. v. Gallagher, 1939, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595; McGoldrick v. Berwind-White Co., 1940, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.

While the rigid distinction between production and commerce no longer holds in so far as the exercise of congressional restraint and regulation is concerned (See United States v. Darby, 1941, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. ——, 132 A. L. R. 1430), it is still maintained when we come to assay the exercise of state powers. In a leading case on the subject (Heisler v. Thomas Colliery Co., 1922, 260 U. S. 245, 43 S. Ct. 83, 86, 67 L. Ed. 237), Mr. Justice McKenna stated the principle in these words:

"'We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the [fol. 188-26] products of a state that have, or are destined to have, a market in other states *are subjects of interstate commerce*, though they have not moved from the place of their production or preparation.

"'The reach and consequences of the contention *repels its acceptance*. If the possibility, or indeed certainty, of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. *It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides*

*and flesh of cattle yet "on the hoof", wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production.'* Heisler v. Thomas Colliery Co., 1922, 260 U. S. 245, 259, 43 S. Ct. 83, 67 L. Ed. 237. (Italics added.)

And see Veazie v. Moor, 1852, 14 How. 568, 573, 574, 14 L. Ed. 545; Kidd v. Pearson, 1888, 128 U. S. 1, 20, 21, 9 S. Ct. 6, 32 L. Ed. 346; Oliver Iron Co. v. Lord, 1923, 262 U. S. 172, 178, 179, 43 S. Ct. 526, 67 L. Ed. 929.

[fol. 188-27] The act there before the Court subjected every ton of anthracite coal mined 'washed, screened, or *otherwise prepared for market*' in the state to a one and one-half percent tax of its value when prepared for market, to be assessed after it is prepared as indicated and 'is ready for shipment or market.' Penn. Laws, 1921, page 479, 72 P. S. Pa. Sec. 2501.

Here was a product, anthracite coal, on which many states depended at the time, for fuel, found only in a small number of counties in the State of Pennsylvania, and, from its very nature, destined for interstate commerce the moment it left the mine. Here was a tax, the effect of which made the cost of production greater and sale in interstate commerce more burdensome. Yet the Court could see in it no assault upon federal supremacy in the realm of interstate commerce.[10]

I can see no escape from this conclusion.

Unless we are ready to say that the recent decisions extending congressional power to regulate local conditions,

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[10] This case was decided *after* Lemke v. Farmers' Grain Co., 1922, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458, upon which my associates' finding of unconstitutionality of the raisin program is chiefly bottomed. And the opinion was written *by the same justice*, Mr. Justice McKenna. The principles it declares have never been questioned. Some of the later cases in which it is cited or followed are: Oliver Iron Co. v. Lord, 1923, 262 U. S. 172, 179, 43 S. Ct. 526, 67 L. Ed. 929; United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 1924, 265 U. S. 457, 465; 44 S. Ct. 623, 68 L. Ed. 1104, 33 A. L. R. 566; Hope Gas Co. v. Hall, 1927, 274 U. S. 284, 288, 47 S. Ct. 639, 71 L. Ed. 1049; McGoldrick v. Berwind-White Co., 1940, 309 U. S. 33, 47, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.

through the exercise of control over interstate commerce, have destroyed the power of the States to deal with products of agriculture or manufacture which are destined for interstate commerce before they actually enter the flow of that commerce. Even the most extreme of the newer federalists would not go so far. See Walton H. Hamilton and Douglass Adair, 1937, The Power to Govern; Edward Corwin, 1926, The Commerce Power versus State Rights; Edward Corwin, 1941, Constitutional Revolution Limited. [fol. 188-28] The thoughts just expressed find support in Champlin Refining Co. v. Commission, 1932, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A. L. R. 403, which involved the Oklahoma oil prorate law. It is true that oil, being a natural resource, allows, constitutionally, broader regulation both federal and state, than other products of industry or agriculture. And the Court said so. However, the Court, while giving its sanction to the State's regulation upon that score, also dealt specifically with its relation to the interstate commerce clause. And, in finding no conflict with it, the Court did not place its decision upon *the character of oil as a natural resource.* It determined the case upon the ground that the law was a regulation of production before oil entered the flow of interstate commerce. And it found it unobjectionable, although the oil was intended for interstate shipment. The Court said:

" 'Plaintiff contends that the act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. * * * It is clear that the regulations prescribed and authorized by the act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation, and therefore is not a part of interstate commerce, even though the product obtained *is intended to be and in fact is immediately shipped in such commerce.* Oliver Iron Co. v. Lord, 262 U. S. 172, 178, 43 S. Ct. 526, 67 L. Ed. 929; Hope Gas Co. v. Hall, 274 U. S. 284, 288, 47 S. Ct. 639, 71 L. Ed. 1049; Foster Packing Co. v. Haydel, 278 U. S. 1, 10, 49 S. Ct. 1, 73 L. Ed. 147; Utah Power & Light Co. v. Pfost, supra (286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038). No violation of the commerce clause is shown.' Champlin Refining Co. v. Commission, 1932, 286

[fol. 188-29] U. S. 210, 235, 52 S. Ct. 559, 565, 76 L. Ed. 1062, 86 A.L.R. 403 (Italics added.)"[11]

In effect, this means that the nature of a product does not determine its availability as an object of state legislative control outside of the inhibition of the commerce clause. Rather must the question be determined in the light of the facts in each case. A state embargo upon a product is forbidden. See Lemke v. Farmers' Grain Co., 1922, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458; Shafer v. Farmers' Grain Co., 1925, 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; Baldwin v. Seelig, 1935, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55. But state enactments or programs which affect, *indirectly*, either through regulation or taxation, the quantity of a product available for use in interstate commerce before it enters it, do not,

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"[11] The California Agricultural Prorate Act was enacted on June 5, 1933, St. 1933, p. 1969, after the decision in Champlin Refining Co. v. Commission, 1932, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403, which was filed on May 16, 1932. It was modeled after the Oklahoma Oil prorate statute which the Court had before it in that case. Its definition of 'waste' is almost identical with that in the Oklahoma Statute. It reads:

"The terms "agricultural waste"—in addition to their ordinary meaning—shall include economic waste, and waste incident to the harvesting and/or preparation for any delivery to market of agricultural commodities in excess of *reasonable market demands.*' (Calif. Stats. 1933, Ch. 754, Sec. 2, as amended by St. 1935, p. 1527(b)) (Italics added.)

"The definition of waste in the Oklahoma Statute, 52 Okl. St. Ann. Sec. 273 (as found in a footnote to page 223 of 286 U. S., 52 S. Ct. at page 560 of the opinion) reads:

" 'That the term "waste" as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or *reasonable market demands.*" (Italics added.)

as I read the cases, impinge upon the commerce clause.[12] To hold otherwise is to bring about the conditions which Mr. Justice McKenna envisaged in Heisler v. Thomas Colliery Co., supra. It is to remove every product, the sale of which is ultimately an interstate act, from local control. For if every regulation which may affect the quantity of the product available for interstate shipment be violative of the commerce clause, state statutes regulating the quantity and conditions of production of an article of commerce, or the wages or hours and conditions of labor of employees producing it, must go by the board. And the reason is obvious. For such legislation, from an economic stand-
[fol. 188-30] point, ultimately affects production. It increases the burden upon production and discourages those who consider the burden oppressive from engaging in such enterprise.

And this is true, whether we consider restrictions on working hours of men (California Labor Code, St. Cal. 1937, p. 205, et seq., Secs. 510-856) or of women and children (California Labor Code, Secs. 1171-1398, p. 213 et seq.) regulations of the manner of payment of wages (California Labor Code, Secs. 200-452, p. 201 et seq.), minimum sanitation requirements (California Labor Code, Secs. 2330-2425, p. 253 et seq.), or laws establishing employers' liability (California Labor Code, Secs. 3201-6002, p. 265 et seq.), or decreeing safety devices (California Labor Code, Secs. 6300-7601, p. 306 et seq.).

They all increase cost and, therefore, diminish the quantity of production. It is also axiomatic that free, unregulated, anarchic enterprises attract the intrepid and adventurous in the economic field more readily than strictly controlled ventures. Control thus diminishes production in existing establishments and discourages increase in the number of enterprises.

[fol. 188-31] It follows that if the fact that a product is destined for interstate commerce, automatically places it without the scope of state control, then control of the type enumerated is immediately nullified.

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[12] "A very recent illustration of judicial sanction for a state regulation of the handling of what might be called an inherently interstate commodity, tobacco, is found in Townsend v. Yeomans, 1937, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210."

To bring these thoughts to bear upon the problems before us.

Raisins as produced by the grower; through the drying and sweating process, from grapes grown on his land, are not an article of commerce. They are not ready for shipment or market. Nor are they fit for human consumption. Before they may be served as human food, the packers must process them through a complicated process. This alone makes them palatable and fit for use. The State of California has undertaken, through this legislation, and the program intended to carry it into effect, to impose certain regulations, to pool a portion of the crop and to restrict free sales as between the growers and the packers. This program, which derives its sanction from the assent of the growers, deals entirely with raisins before they enter the flow of interstate commerce. I grant that its effect is to restrict freedom of action in dealings between growers and packers within the state. If this result in making raisins unavailable to recusants like the plaintiff, except upon compliance with certain conditions, this is no more a direct burden on interstate commerce than was the tax on anthracite coal (Heisler v. Thomas Colliery Co., supra), *without the payment of which no anthracite coal was available for shipment in interstate commerce*, or the curtailment of oil production through proration, (Champlin Refining Co. v. Commission, supra), *which reduced directly the quantity of oil available for shipment in interstate commerce.*

Hence my dissent from the conclusion reached by my colleagues."

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[fol. 189] In District Court of the United States

[Title omitted]

**Findings of Fact and Conclusions of Law**—Filed December 4, 1941

This case came on regularly for trial before a statutory three-judge court convened before the Honorable Campbell E. Beaumont, United States District Judge for the Southern District of California, by calling to his assistance the Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, and the

Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, pursuant to Section 266 of the Judicial Code, as amended (28 U. S. C. A. [fol. 190] Section 380), sitting in its courtroom in the Federal Building, in the City of Fresno, in the State of California.

Plaintiff was represented by his attorneys and solicitors, Messrs. Aten & Aten, and G. L. Aynesworth, Esq., and the defendants by Earl Warren, Esquire, Attorney General of the State of California, and Messrs. Walter L. Bowers, W. R. Augustine and Gilbert F. Nelson, Deputies Attorney General, appearing for W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, and W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, and Preston McKinney, members of said Commission, and J. C. Harlan; and Strother P. Walton, Esq., appearing for Raisin Proration Zone No. 1, Program Committee, and H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, and W. J. Cecil, members of said Committee.

On March 7th, 1941, plaintiff's application for an interlocutory injunction was heard before the above-mentioned three-judge court and said application was denied, and the cause was directed to be set for trial on its merits at as early a date as the court's calendar would permit.

Accordingly, the trial was commenced on April 11th, 1941, and concluded on April 12, 1941, and evidence, both oral and documentary, was introduced on behalf of the respective parties and at the conclusion thereof the cause was argued and submitted; that thereafter upon the Court's own motion the case was reopened for the purpose of taking more evidence, and on the 16th day of October, 1941, further evidence was offered and received and the cause then again submitted.

Wherefore, the court being fully advised in the premises [fol. 191] now makes its findings of fact and conclusions of law as follows:

## Findings of Fact

### I

That the State of California, through its duly authorized officers, is attempting to enforce the provisions of a prora-

tion program for raisins (hereinafter sometimes called the program) prescribed under the authority of the California Agricultural Prorate Act (Chapter 754, California Statutes 1933), as amended (hereinafter sometimes called the Act), and is claiming penalties in the amount of $13,000.00 against the plaintiff; that the plaintiff, since the commencement of the raisin crop season of the year 1939, has been and is now engaged in the business of producing, buying, packing and selling sun-dried raisins produced in said zone, including raisins produced in the crop year 1940; that the plaintiff on September 7, 1940, had orders for the delivery of sun-dried raisins produced in said zone in the year 1940 which he could not fill without complying with the seasonal program for raisins hereinafter referred to, and that defendants in enforcing said program have directly interfered with and obstructed plaintiff's said business and thereby damaged the plaintiff in a sum in excess of $3,000.00, exclusive of interest and costs, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

II

That defendant Raisin Proration Zone No. 1, is and has been since August 3, 1937, a Proration Zone organized and existing pursuant to the provisions of the Agricultural Prorate Act of the State of California, (Chapter 754, Statutes of 1933) as amended, for the purpose of applying [fol. 192] the provisions of said Agricultural Prorate Act to an agricultural commodity, to wit, raisins, being unbleached, sun-dried, or partially sun-dried, grapes of the Thompson Seedless, Sultana, and Muscat varieties grown and produced in the said Zone, consisting of the Counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings, and Kern within the State of California.

That defendant, W. B. Parker is Director of Agriculture of the State of California; that defendants, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, and Preston McKinney, are the members of the Agricultural Prorate Advisory Commission of the State of California; that defendants, H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, and A. L. Davidson are the members of the Program Committee of Raisin Proration Zone No. 1; that defendant, W. J. Cecil,

at the time of the commencement of this action was the duly appointed zone agent of said zone and that he was succeeded as zone agent by defendant, Lyman Lantze, prior to the trial of this case.

III

That pursuant to the provisions of said Act a proration program for raisins in said zone was instituted August 4, 1937, and continued in effect until it was amended effective July 23, 1940, which program as thus amended ever since has been and still is in force and effect; that said program is correctly set out in the answer to the first amended complaint on file herein, as Exhibit A thereof; that pursuant to the provisions of said program as amended a seasonal marketing program for raisins for 1940-1941 was duly and regularly adopted and approved and became effective September 7th, 1940, and which seasonal program is and [fol. 193] has been ever since said date in force and effect.

IV

That the essential features of said 1940-1941 seasonal marketing program for raisins (hereinafter referred to as the Program), together with the financing arrangement, are as follows:

(a) That 20% by variety of all "standard" raisins of the 1940 crop produced within the Zone shall be delivered by the producers into a surplus pool; and that an advance shall be made to producers on such raisins at the time of delivery by such producers of $27.50 per ton for Muscat and Thompson Seedless raisins, and $25.00 per ton for Sultanas, to be obtained from the proceeds of a non-recourse loan from Commodity Credit Corporation.

(b) That 50% by variety of all such "standard" raisins shall be delivered into a stabilization pool; and that an advance shall be made to producers upon such raisins at the time of delivery by such producers of $55.00 per ton for Muscat and Thompson Seedless raisins, and $50.00 per ton for Sultanas, to be obtained from the proceeds of said non-recourse loan from Commodity Credit Corporation.

(c) That the balance of such standard raisins, to wit, 30% of each producer's standard raisins, may be dis-

posed of by him without restriction into a primary channel of trade as "free tonnage", provided he has obtained a secondary certificate therefor, which certificate is issued to him when he has satisfied the pool requirements and upon payment of the certificate fee of $2.50 per ton for each ton of the "free tonnage" (30% of his 1940 production of "standard" raisins.)

(d) That no "sub-standard" or "inferior" grade raisins [fol. 194] may be offered as "free tonnage" or delivered to the surplus or stabilization pools, but that such raisins shall be delivered into separate pools for disposal by the Program Committee at the best prices and under the fairest conditions obtainable for by-product purposes and that the net proceeds thereof shall be distributed ratably to the producers contributing to such pools.

That said proration program instituted August 4, 1937, and amended July 23, 1940, provides for disposing of the raisins in the surplus and stabilization pools, the essential portions of said provisions reading as follows:

"*Disposal of Surplus Pool.* Pursuant to this Section 4, the Committee shall sell or authorize the sale of surplus pool raisins as soon as practicable after delivery of same to the Committee or to any agency authorized by the Committee to receive such raisins; provided, however, that none of the standard raisins in such pool shall be sold or otherwise disposed of prior to January 1 of the marketing season in which such pool is established. The sale of such raisins shall be made in accordance with the methods and at the prices which in the judgment of the Committee or its authorized agency and the Director are the most advantageous to the producers of such raisins. The Committee shall make provisions whereby a producer who delivers raisins to a surplus pool may, within the shortest time practicable, buy the same or an equivalent grade of raisins, subject to regulations to be established by said Committee. "Surplus pool raisins shall be sold only for assured by-product and other diversion purposes, and shall not be [fol. 195] sold into normal marketing channels."

"*Disposal of Stabilization Pool.* Pursuant to this Section 4 the Committee shall sell or authorize the sale of stabilization pool raisins as soon as practicable after delivery of

same to the Committee, or to any agency authorized by the Committee to receive such raisins, in such manner as to maintain stability in the markets and to dispose of such raisins. The procedure relative to the disposition of such raisins and the provisions of the contract of sale shall be established by the Committee with the prior approval of the Director; provided, however, that all packers of record with the Program Committee shall be given uniform notice of offers to sell stabilization pool raisins and, if allocation of tonnage among packers becomes necessary, such allocation shall be made under uniform rules, which are equitable as to all packers participating in offers to purchase, as formulated by the Committee and approved by the Director. The sale of such raisins shall be made in accordance with the methods and at the prices which in the judgment of the Committee or its authorized agency and the Director are the most advantageous to the producers of such raisins; provided, however, that no sales of raisins from a stabilization pool, other than such raisins which are subject to special loaning or pooling arrangements with the Federal Government, shall be made at less than the prevailing market price for raisins of the same variety and grade on the date of sale.

[fol. 196] "Stabilization pool raisins shall be sold only into normal marketing channels."

V

That pursuant to the provisions of said Act and in accordance with the terms of the Proration Program for Raisins as amended, as set forth in said Exhibit "A", and particularly Article XX thereof, the said Program Committee duly established and declared effective the grades and rules and regulations governing the same for "standard" raisins, which same became effective September 10th, 1940, and ever since have been and now are in force and effect, and that this in conjunction with the definition in Article I of said program, as set forth in said Exhibit "A", fixes the quality and grades for "standard", "sub-standard" and "inferior" raisins of the 1940 crop.

VI

That 90% to 95% of the naturally dried raisins consumed in the United States are produced in said zone; and that

90% to 95% of such raisins produced in said zone are consumed outside the State of California.

VII

That Commodity Credit Corporation is a corporation organized pursuant to the laws of the United States of America for the purpose of making loans on agricultural commodities that are recommended by the Secretary of Agriculture of the United States and approved by the President of the United States. That prior to September 7th, 1940, the defendants herein had been negotiating with the officers of said Commodity Credit Corporation for the purpose of securing financial assistance for producers of 1940 crop raisins in the State of California, and that subsequent to September 7th, 1940, Commodity Credit Cor- [fol. 197] poration executed a loan agreement with the defendant, Raisin Proration Zone No. 1, by and under the terms of which said corporation agreed to supply the funds for making the advances to producers as set forth in the 1940-1941 seasonal marketing program for raisins, and that the existence of said loan and the institution and existence of said proration program for raisins and the adoption, approval and operation of said seasonal marketing program for raisins for 1940-1941 constituted conditions precedent upon which such loan was made.

VIII

That the producer or farmer makes sun-dried raisins by placing the harvested bunches of ripe grapes upon trays laid upon the ground in the vineyard in such a way that the grapes are dried into raisins by the direct rays of the sun; that during the drying period the former turns the bunches of the grapes on the trays so that all sides of the grapes are exposed to the sun, thus securing a uniformity in drying; that when the grapes are properly dried, they are placed in "sweat" boxes where the moisture retained in the dried grapes automatically equalizes toward the right proportions, completing the curing of the grapes into raisins. Such process is entirely accomplished on the premises where the grapes are grown, and when properly done, the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce. They are then substantially ready for market as raisins. The process of cleaning,

stemming, cap-stemming, seeding (muscats only), grading, sorting and packaging in various sized containers, which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater de- [fol. 198] mand for them in the market, but is not essential to production.

IX

That plaintiff is and has been a producer of raisins in said zone prior to and ever since the institution of a proration program for raisins therein on August 4th, 1937. That as such a producer of raisins plaintiff has dealt with the defendant, Raisin Proration Zone No. 1, and participated in said program during the 1938 crop season year, and applied for and received and accepted primary and secondary certificates for his raisins for such crop year. That during said year 1938 he was a producer only of raisins but in the year 1939 he became a packer and since then has been and now is both a producer and packer of raisins, and that he produced approximately 200 tons of raisins in said Zone in the year 1940. That no seasonal program for raisins was adopted for the crop year 1939 and no restrictions for said crop year were made under said proration program. That for the crop year 1940 plaintiff did not apply for nor receive any primary or secondary certificates for his raisins and has refused to apply for the same and has not participated in said 1940 seasonal program in any manner whatsoever. That the 1938 seasonal marketing program for raisins differed from said 1940 seasonal program, in that, said 1938 seasonal program did not have any stabilization pool requirement. That there are approximately forty raisin packers within the State of California, all of whom have packing plants and places of business located within said zone; that said packers made all their purchases and take all their deliveries of raisins within the State of California; that such sales are com- [fol. 199] pleted when the delivery is made and practically all sales are cash transactions; that before packing and shipping such raisins the packers clean, stem and package them, using various methods suitable to their respective plants and tending to make the raisins more desirable commercially; that such operation by the packers is not essential to production. That the raisins of the various producers delivered to any packer are commingled and no producer has

any knowledge or means of knowledge of the subsequent movement or ultimate use or consumption of the particular raisins delivered by him and has no legal title therein after such delivery to the packer and has no knowledge or means of knowledge as to whether the same ultimately moved in intrastate or interstate commerce, except that at times certain producer packers ship some of their own production directly into interstate commerce.

X

That plaintiff as a packer contracts for delivery of a very large percentage of the raisins he handles directly into interstate and foreign commerce; that plaintiff on September 7, 1940, had substantial orders for out of state delivery of raisins which he could not fill by purchase of "free tonnage" and could not fill at all because of said pools without complying with said program; that defendants in enforcing said program have directly and substantially interfered with and obstructed plaintiff's said business and have directly and substantially burdened interstate and foreign commerce.

XI

That defendants have attempted to enforce said act as implemented by said program against plaintiff and against those persons who have sold raisins to plaintiff since Sep- [fol. 200] tember 7, 1940; that since said date defendants have maintained watchers at and near plaintiff's place of business for the purpose of ascertaining from whom plaintiff purchases raisins and for the purpose of preventing sales of raisins to plaintiff in violation of said program; that defendants threaten to continue to enforce said program against plaintiff and persons selling 1940 crop raisins to him; that defendants have attempted, and are attempting and threatening, to force plaintiff and all other raisin growers to deliver and dispose of the 1940 crop by and through said program, and have attempted, and are attempting, to prevent disposal of such raisins except through said program.

XII

That plaintiff's said business has great value to plaintiff and that irreparable damage will be done to plaintiff by

defendants unless the enforcement of said program is enjoined.

XIII

That plaintiff is not estopped to question the constitutionality of said program.

That plaintiff has not been guilty of laches.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings, the Court holds:

I

That the Court has jurisdiction of this case.

II

That said seasonal marketing program constitutes and is a direct, substantial, and illegal interference with inter- [fol. 201] state and foreign commerce in wholesome and sound raisins.

III

That plaintiff is entitled to an injunction permanently enjoining defendants from enforcing or attempting to procure the enforcement in any manner of said program against plaintiff or anyone dealing with plaintiff in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, and enjoining defendants from in any manner annoying, harrassing or molesting plaintiff or persons doing such business with him.

IV

That Cross-complainant Raisin Proration Zone No. 1 is entitled to nothing by reason of its Cross-Complaint.

V

That the action should be dismissed as to the fictitious defendants.

Let judgment be entered accordingly.

Done in open Court this 26th day of November, 1941.

Albert Lee Stephens, Circuit Judge. ————, District Judge. Campbell E. Beaumont, District Judge.

[fol. 202] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 78 Civil

PORTER L. BROWN, Plaintiff,

vs.

W. B. PARKER, Director of Agriculture, AGRICULTURAL PRORATE ADVISORY COMMISSION, Raisin Proration Zone No. 1, Program Committee, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, Preston McKinney, H. C. Anderson, A. K. Kelly, Renald Matrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, W. J. Cecil, J. C. Harlan, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe and Eight Doe, Defendants

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RAISIN PRORATION ZONE No. 1, a Proration Zone, Cross-Complainant,

vs.

PORTER L. BROWN, Cross-Defendant.

FINAL JUDGMENT—Filed December 4, 1941

This case came on regularly for trial before a statutory three-judge court convened before the Honorable Campbell E. Beaumont, United States District Judge for the Southern District of California, by calling to his assistance the Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, and the Honorable Leon R. Yankwich, United States Disfrict Judge for the Southern District of California, pursuant to Section 266 of the Judicial Code, as amended, (28 U. S. C. A. [fol. 203] Section 380), sitting in its courtroom in the Federal Building, in the City of Fresno, in the Northern Division of the Southern District of California.

Plaintiff was represented by his attorneys and solicitors, Messrs. Aten & Aten, and G. L. Aynesworth, Esq., and the defendants by Earl Warren, Esquire, Attorney General of the State of California, and Messrs. Walter L. Bowers,

W. R. Augustine and Gilbert F. Nelson, Deputies Attorney General, appearing for W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, and W. B. Parker; Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, and Preston McKinney, members of said Commission, and J. C. Harlan; and Strother P. Walton, Esq., appearing for Raisin Proration Zone No. 1, Program Committee, and H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, and W. J. Cecil, members of said Committee.

The trial of this action was commenced on April 11, 1941, and concluded and submitted to the court for its consideration and decision on April 12, 1941; that thereafter upon the Court's own motion the case was reopened for the purpose of taking more evidence, and on the 16th day of October, 1941, further evidence was offered and received and the cause then again submitted; and after due consideration thereof the court herein made and filed its Findings of Fact and Conclusions of Law,

Now, Therefore, pursuant to the written Findings of Fact and Conclusions of Law herein made and entered,

It Is Hereby Ordered, Adjudged And Decreed:

1. That the seasonal marketing program for raisins for [fol. 204] 1940-1941 adopted pursuant to the provisions of the Agricultural Prorate Act of the State of California (Chapter 754, Statutes of 1933) as amended, constitutes and is a direct, substantial, and unconstitutional interference with interstate and foreign commerce in wholesome and sound raisins.

2. That the defendants herein, and each of them, and their respective agents, deputies, employees, attorneys and successors, and all other persons acting under or through their authority be, and each of them is, hereby permanently restrained and enjoined from enforcing or attempting to enforce or procure the enforcement of said program, or any portion thereof, against plaintiff, or anyone dealing with plaintiff, in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, but not as to unwholesome, unsound or inferior raisins, and from in any manner annoying, harrassing, or molesting plaintiff or persons doing such business with plaintiff.

3. The reason for the issuance of a permanent injunction herein is that said program violates Article I, Section 8, of the Constitution of the United States, and that defendants have enforced said program against plaintiff and persons doing business with plaintiff and threaten to continue such enforcement.

4. That Cross-Complainant Raisin Proration Zone No. 1 take nothing by reason of its Cross-Complaint;

5. That the action is dismissed as to the fictitious defendants; and

6. That plaintiff have judgment for his costs herein expended, taxed at $28.75.

[fol. 205] Done in open court this 26th day of November, 1941.

Albert Lee Stephens, Circuit Judge; —— ——, District Judge; Campbell E. Beaumont, District Judge.

[File endorsement omitted.]

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[fol. 206] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed December 26, 1941

To the Honorable Judges of the Above Entitled District Court of the United States:

The defendants herein, W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, Program Committee, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm F. Darsie, Dr. Dean McHenry, Preston McKinney, H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, W. J. Cecil and J. C. Harlan, and each of them, feeling aggrieved by the final decree and permanent injunction rendered by the Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, the Honorable Campbell E. Beaumont

and the Honorable Leon R. Yankwich, Judges of the District Court of the United States for the Southern District of California, organized and sitting as a three-judge court under and by virtue of the provisions of Section 380 of [fol. 207] the United States Code Annotated (Judicial Code Section 266, as amended) for the hearing and determination of this cause, and entered in the above entitled cause on or about December 4th, 1941, do hereby appeal from said final decree and permanent injunction to the Supreme Court of the United States.

The particulars wherein they, and each of them, consider such final decree and permanent injunction erroneous are set forth in the Assignment of Errors filed herewith, to which reference is hereby made.

They pray, and each of them prays, that this appeal be allowed; that a transcript of the record, proceedings and papers upon which said final decree and permanent injunction was based, made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States under the rules of such court in such cases made and provided.

And they further pray, and each of them prays, that the proper order relating to the required security to be required of them be made.

Dated: December 26, 1941.

Earl Warren, Attorney General of the State of California, Walter L. Bowers, W. R. Augustine, Gilbert F. Nelson, Deputies Attorney General.

Attorneys for defendants, W. B. Parker, Director of [fol. 208] Agriculture, Agricultural Prorate Advisory Commission, and W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, and Preston McKinney, members of said Commission, and J. C. Harlan.

Strother P. Walton, Attorney for defendants, Raisin Proration Zone No. 1, Program Committee, and H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, and W. J. Cecil, members of said Committee.

ORDER ALLOWING APPEAL

The foregoing petition is hereby granted and the appeal of the defendants named, and each of them, is allowed upon giving bond as required by law in the sum of $500.00.

Dated: December 26, 1941.

Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, sitting under provisions of Section 380 U. S. C. A.

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[fol. 209] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed December 26, 1941

Now come the defendants in the above entitled cause, W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, Program Committee, W. B. Parker, Ira Redfern, Lyman Lantze, James Langford, Mark G. Johnson, C. M. Brown, Wm. F. Darsie, Dr. Dean McHenry, Preston McKinney, H. C. Anderson, A. K. Kelly, Renald Mastrofini, Alex Berg, Mesrob Mirigian, Melchior Hansen, A. L. Davidson, W. J. Cecil and J. C. Harlan, and each of them, and in connection with their petition for appeal, present and file the following Assignments of Error upon which they will rely on their appeal to the Supreme Court of the United States from the final decree and permanent injunction of the above entitled District Court of the United States, entered on or about December 4, 1941.

That the District Court of the United States, in and for the Southern District of California, Northern Division, and the Special Three Judge Court organized and sitting herein, erred:

1. In failing and refusing to grant defendants' motion to dismiss the above entitled action and in failing and refusing [fol. 210] to dismiss the same, and in issuing a permanent injunction against the defendants herein.

2. In finding and holding that plaintiff has not been guilty of laches and is not estopped to question the constitu-

tionality of the seasonal proration program for raisins herein mentioned.

3. In holding as a conclusion of law that the court has jurisdiction of this case and in failing to dismiss this action for lack of jurisdiction.

4. In holding as a conclusion of law that the seasonal marketing program for raisins mentioned herein and in this action constitutes and is a direct, substantial and illegal interference with interstate and foreign commerce in wholesome and sound raisins.

5. In holding as a conclusion of law that plaintiff is entitled to an injunction permanently enjoining defendants from enforcing or attempting to procure the enforcement in any manner of said seasonal proration or marketing program for raisins against plaintiff or any one dealing with plaintiff in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, and enjoining defendants from in any manner annoying, harassing or molesting plaintiff, or persons doing such business with him.

6. In failing to specify whether the matters found in Paragraph I of the Findings were or occurred in connection with interstate or intrastate transactions, and in failing to expressly find that all of such penalties and all of the business and all of the damage set forth and mentioned in Finding I were solely and wholly intrastate.

[fol. 211] 7. In finding in Paragraph I of the Findings that defendants "have directly interfered with and obstructed plaintiff's said business and thereby damaged the plaintiff in a sum in excess of $3,000.00", contrary to the evidence introduced and not in response to any issue or pleading in the case.

8. In overruling and disregarding defendants' objections to the finding set forth in Finding VI, and leaving in said finding the statement "that 90% to 95% of the naturally dried raisins consumed in the United States are produced in said zone" without any evidence whatsoever in support thereof, and in leaving in said finding the statement "that 90% to 95% of such raisins produced in said zone are consumed outside the State of California", contrary to

the evidence and the stipulation that "such raisins are ultimately consumed both within and without the State of California, but 90% to 95% of the raisins consumed as raisins, and for human consumption, are ultimately consumed outside of the State of California."

9. In overruling and disregarding defendants' objections to the findings contained in Finding VIII and leaving in said finding the statement that "where the moisture retained in the dried grapes automatically equalizes toward the right proportions, completing the curing of the grapes into raisins. Such process is entirely accomplished on the premises where the grapes are grown and when properly done the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce.", contrary to the evidence and the statement of facts, and also leaving in said finding the statement that "the process of [fol. 212] cleaning, stemming, cap-stemming, seeding (muscats only), grading, sorting and packaging in various sized containers, which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater demand for them in the market, but is not essential to production.", contrary to the evidence and the stipulation of facts.

10. In overruling and disregarding defendants' objections to the finding contained in Finding IX, and in leaving in said finding the statement "that before packing and shipping such raisins the packers clean, stem and package them using various methods suitable to their respective plants and tending to make the raisins more desirable commercially; that such operation by the packers is not essential to production.", contrary to the evidence and the stipulation of facts.

11. In overruling and disregarding defendants' objections to each and all of the findings set forth in Paragraph X thereof, and in leaving in said paragraph X the findings therein contrary to the evidence and the stipulation of facts, and in leaving in said finding the holding that the defendants "in enforcing said program have directly and substantially interfered with and obstructed plaintiff's said business and have directly and substantially burdened interstate and foreign commerce."

12. In holding and finding as a fact in Finding XII "that plaintiff's said business has great value to plaintiff and that irreparable damage will be done to plaintiff by defendants unless the enforcement of said program is enjoined."

[fol. 213] 13. In holding and ruling that the seasonal proration program for raisins directly burdens, and in holding that it effectively prevents, the free flow of interstate commerce.

14. In holding and ruling that such program is not based upon the protection of the industry through exclusion from the market of unfit raisins.

15. In holding and ruling that such program is not a regulation of proper conditioning of the raisins prior to their being offered to the consumer.

16. In holding and ruling that the production of raisins and the drying and curing thereof on the premises where the grapes are grown is complete on said premises and before said raisins have been fully cured and have been cleaned, stemmed and packaged.

17. In holding and ruling that the cleaning, stemming, cap-stemming, seeding, sorting and grading is not any part of production of such raisins, and is not essential to such production.

18. In holding and ruling that the purpose and necessary effect of the seasonal proration program is to place a controlled embargo on the State's raisin production.

19. In holding and ruling that the seasonal proration program is simply a means of controlling the supply of raisins into interstate trade channels.

20. In holding and ruling that any regulation of the amount of wholesome raisins which may be produced, harvested and prepared for market in accordance with and in the amount and at the times that the available market will absorb the same is a direct burden and obstruction of interstate commerce and not an aid and benefit thereto.

[fols. 214-224] Wherefore, defendants and appellants herein pray that said final decree be reversed and said permanent injunction dissolved, and that said District Court

of the United States, in and for the Southern District of California, Northern Division, and the Three Judge Court organized and sitting therein, be ordered to enter a decree reversing the decision of the lower court in said cause, and dissolving the said permanent injunction, and for such other and further relief as to the Court may seem fit and proper.

Respectfully submitted, Earl Warren, Attorney General. Walter L. Bowers, W. R. Augustine, Gilbert F. Nelson, Deputies Attorney General. Strother P. Walton, Attorneys for Defendants and Appellants.

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[fol. 225] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER TO TRANSMIT ORIGINAL EXHIBITS—Filed February 13, 1942

It being proper in the opinion of the Presiding Judge in the court from which the appeal herein is taken and the Judge who signed the order allowing such appeal and the citation herein that the following described instruments, papers, documents and exhibits in evidence in the above cause be inspected by the Supreme Court of the United States upon the appeal thereto in said cause:

It Is Therefore Hereby Ordered that the Clerk of this court safely transmit to the Clerk of the Supreme Court of the United States at Washington, D. C., to be safely kept by said Clerk for the inspection and use by said Supreme Court in the consideration of the appeal in this cause the following records, instruments, papers, docu-
[fols. 226-230] ments and exhibits in the above entitled cause, to wit:

(a) Plaintiff's Exhibits 1 to 5, both inclusive;
(b) Plaintiff's Exhibits 7 to 14, both inclusive;
(c) Defendants' Exhibits A, B, C and D.

It is further ordered that it shall be unnecessary to print any of the same as part of the printed record on appeal herein, and that upon the final determination of said cause in the Supreme Court of the United States said exhibits

shall be safely returned to the Clerk of this court to be kept by him on file herein.

Dated: February 13th, 1942.

Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, sitting under provisions of Section 380 U.S.C.A.

We, the undersigned counsel for the respective parties to the above entitled action, do hereby stipulate and agree to the above and foregoing order.

Dated: February 11, 1942.

Aten & Aten & G. L. Aynesworth, Counsel for Plaintiff and Appellee. Earl Warren, Attorney General, Walter L. Bowers, Deputy Attorney General, Strother P. Walton, Counsel for Defendants and Appellants.

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[fol. 231] IN UNITED STATES DISTRICT COURT

**Statement of the Evidence from Reporter's Transcript of April 11 and 12, 1941.**

Fresno, California, Friday, April 11, 1941, 10:00 A. M.

The Clerk: Porter L. Brown vs. W. B. Parker and others.

PORTER L. BROWN, the plaintiff herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

Judge Beaumont: You may be seated, Mr. Brown. Mr. Aten, it seems that it would be well at this time, before any testimony is taken, if you will make a statement, which I am sure will be agreed to, as to the nature of the limitation of the issues and, also, as to the stipulation that has been filed. However, I think the stipulation probably speaks for itself in that respect. Is this the original?

Judge Beaumont: This appears to be the original, not the carbon copy. So it will be filed as a part of the record in this case. And that was your intention?

Mr. Aten: That was the intention.

Mr. Bowers: Will it be designated as an exhibit if it is part of the record?

Judge Beaumont: If you desire to have it made as an exhibit, you may do so, but if it is a part of the record, it

will be before the Court for all purposes. If you think it would be more easily referred to as an exhibit, it may be received for that purpose, but it isn't necessary, so long as it is part of the record of the case. It has been suggested by Judge Yankwich that it be marked as parties' joint [fol. 232] exhibit. Is that agreeable?

Mr. Bowers: That is agreeable.

Mr. Aten: That is satisfactory. Under the stipulation the parties have reserved the right to introduce evidence on any matter that they deem material, and we also made the reservation, in the stipulation, that matters contained in the stipulation, as to the facts, that we reserve the right to argue that they are immaterial. I think the only matters, as far as I know at this time, on which the plaintiff will introduce evidence is on the jurisdictional issue and on the method of disposal of raisins when they go through the packing houses and into interstate commerce.

Judge Stephens: Isn't that fully set out in the stipulation?

Mr. Aten: It is quite fully set out, but there is a reservation, as to Muscat raisins, as to both parties.

Mr. Bowers: That is correct, may it please the Court. We agreed, as far as we could, on that, but there were other matters which we claim took place and we didn't agree upon, so we reserve them.

Mr. Aten: It is agreed, so far as the plaintiff is concerned, that the case be submitted upon the constitutionality of the program, as implementing the Prorate Act; that the act itself is not here attacked. Is that as you understood it?

Mr. Bowers: That is correct. That is agreeable as to your defendants, is it not?

Mr. Walton: Yes, as far as we are concerned.

Judge Beaumont: Very well. You may proceed with your testimony.

[fol. 233] Direct Examination.

By Mr. Aten:

Q. Your name?
A. Porter Brown.
Q. You are the plaintiff in this action?
A. Yes, sir.

Q. What is your business?

A. I am a grower and a packer.

Q. How long have you been connected with the raisin business?

A. Twenty-five years.

Q. You have been in the packing business for others or yourself during that time?

A. Yes, sir.

Q. And have also been interested in growing for about the same time?

A. Yes, sir.

Q. Have you, in the last five years, kept yourself informed as to markets and production and other matters affecting the raisin business, generally?

A. Yes, sir.

Q. And in detail?

A. Yes, sir.

By Mr. Aten:

Q. Mr. Brown, you allege in your pleadings that you had made contracts in May 1940 for disposal of raisins in the fall of 1940; that you had sold, under contract, certain tons of raisins?

A. Yes, sir.

Q. I have here those three contracts that were introduced before. I refer you to Exhibit No. 1, introduced in this hearing before, and ask you if that is one of the contracts [fol. 234] that you had at that time?

A. Yes, sir.

Mr. Aten: I will offer this contract, if the Court please, as Plaintiff's Exhibit No. 1. And I will offer all of these exhibits as I come to them, and they can have the same number that they bore in the prior hearing.

Judge Beaumont: I think that would be well. Let it be received in evidence and marked as Plaintiff's Exhibit 1.

By Mr. Aten:

Q. This contract, Exhibit No. 1, was for how many tons, Mr. Brown?

A. 125 tons.

Q. That was made in May, as it shows, of 1940, and at what price; that is, the sales price?

A. Three cents a pound.
Q. That is, $60 a ton?
A. Yes, sir.
Q. Was that the price at that time?
A. That was the going price—the going sales price at the time.

Mr. Aten: We will offer the letter that was introduced before as Exhibit 2, and ask that it go in now as Exhibit 2; that is, the letter written by the American Trading Company, the cancellation for non-delivery. And in that letter they stated that the price was now 4 cents a pound and that the whole damage amounted to $2,275 on account of that contract. Is that correct?

Mr. Bowers: No objection to it.

Judge Beaumont: Let it be received in evidence and marked Plaintiff's Exhibit 2.

Mr. Aten: Very well. We now offer Exhibit 3, which [fol. 235] was introduced in the prior hearing in this matter, a contract made with West Coast Growers and Packers in May 1940.

Q. For how many tons was that, Mr. Brown?

Judge Beaumont: Well, doesn't the exhibit speak for itself?

Mr. Aten: Not in tons. It is in cases. 10,000 cases.

Judge Beaumont: Very well.

By Mr. Aten:

Q. What tonnage would that be?
A. 125 tons.

Mr. Aten: We offer that.

Judge Beaumont: Let it be received in evidence and marked Plaintiff's Exhibit 3.

By Mr. Aten:

Q. Is it customary, Mr. Brown, and has it been customary for the packers to sell raisins in advance of the growing season?
A. Yes, sir.
Q. And were others doing it during this same time?
A. Yes, sir.
Q. Were they making sales on the same basis that you made them?

A. Yes, the smaller packers were making sales on the same basis.

Q. Referring to the third contract, the one that has been marked Exhibit 4 in the prior proceedings, for how many tons was that?

A. 200 tons.

Q. And the contract shows it at the same price?

Judge Beaumont: Do you offer that?

Mr. Aten: We offer it as Exhibit 4.

Judge Beaumont: Let it be received and marked as [fol. 236] Plaintiff's Exhibit 4.

By Mr. Aten:

Q. Did you have other contracts, Mr. Brown, that you had made in that month?

A. Yes; one.

Q. For the sale of raisins in the fall of 1940?

A. Yes, sir.

Q. With whom?

A. We made one contract with the Dried Fruit Distributors of California for 10,000 cases.

Q. And for how much tonnage?

A. 125 tons.

Q. At the same price?

A. Yes, sir.

Q. I will ask you if this is that contract?

A. Yes, sir.

Q. Mr. Brown, you have mentioned that you had one other contract with the Dried Fruit Distributors of California for 125 tons. What other contracts did you have, if any, that you made in May 1940, for fall delivery?

A. I had another contract with the American Trading Company for 15,000 cases.

Q. And the tonnage of that?

A. That is 187½ tons.

Q. On the same basis as the other contracts?

A. Yes, sir.

Q. What did that make the total tonnage that you had firm contracts on, in May; that is, for the fall of the year?

A. 762½ tons.

Q. On the basis of a sales price of 3 cents?

[fol. 237] A. Yes, sir.

Mr. Aten: I will now ask to introduce in evidence the Proration Program Bulletin of February 8, 1941, introduced as Exhibit No. 5 in the preliminary hearing here, and ask that it be received again as an exhibit under the same number.

Mr. Bowers: I object to that as incompetent, irrelevant and immaterial under the present issues. The only materiality I see is that it gives certain statistics of the pool operations, which are given in the stipulation.

Mr. Aten: It is material, of course, to show the interference with commerce. Also, there is a statement, contained in the bulletin, that the price of raisins, that is, the sweatbox price, the price to the grower, if it had not been for the program, would have been for the 1940 raisins not over $40 per ton; a statement made by the defendant in the action.

Judge Beaumont: We are of the opinion that it should be received in evidence. It may be received and marked as Plaintiff's Exhibit No. 5. The objection is overruled.

By Mr. Aten:

Q. You testified a moment ago, Mr. Brown, about a contract with the Dried Fruit Distributors for 125 tons. Is this the contract?

A. Yes, sir.

Q. You testified about a contract with the American Trading Company for 187½ tons. Is this that contract?

A. Yes, sir.

Mr. Aten: I now offer a communication from the Proration Program Committee, dated January 13, 1941, which was introduced in the prior hearing as Exhibit 7, in which it [fol. 238] is stated that now they are offering raisins for sale out of the pool.

Judge Beaumont: There being no objection, let it be received in evidence and marked as Plaintiff's Exhibit 7.

Mr. Aten: I offer Exhibit 8, the contract, about which the witness has testified, with the Dried Fruit Distributors of California, dated May 22, 1940, for the sale of 125 tons of raisins at the price of 3 cents per pound, as Plaintiff's Exhibit 8.

Judge Beaumont: Let it be received in evidence and so marked.

Mr. Aten: I offer Plaintiff's Exhibit 9, the contract, about

which the witness has heretofore testified, with the American Trading Company, dated May 14, 1940 for 187½ tons at the same price.

Q. I believe you stated, Mr. Brown, the total tonnage covered by these various sales contracts, did you?

Judge Beaumont: He did so state.

Mr. Aten: Yes.

Q. You had how many tons of your own?

A. 200 tons.

Q. 200 tons. So in order to fill these contracts how many tons was it necessary for you to purchase?

A. 562½ tons.

Mr. Aten: Yes, your Honor. I offered Exhibit No. 9.

Judge Beaumont: I think the Court should rule on that before we proceed with this other matter. Let it be received in evidence and marked as Plaintiff's Exhibit 9.

Mr. Bowers: What is the date of that?

Mr. Aten: It is May 14, 1940, with the American Trad-
[fol. 239] ing Company for 187½ tons at 3 cents per pound.

Judge Beaumont: Let the offered exhibit be received and marked as Plaintiff's Exhibit 9.

By Mr. Aten:

Q. You did keep in touch with markets and other conditions affecting the markets and conditions that would affect the markets at the time raisins were ready for delivery, did you not?

A. Yes, sir.

Q. During all of these years?

A. Yes, sir.

Q. You had bought and sold raisins, pre-season, as in the case of these particular contracts, for many years?

A. Yes, sir.

Q. What was the sweatbox price before the program went into effect on September 7th?

A. $45 a ton.

Q. Was that the basis on which you fixed the price of $60 a ton for the sold goods?

A. Yes, sir.

Q. What was the sweatbox price immediately following the going into effect of the program and continuing through the fall?

A. $55 per ton.

Q. That is an increase of $10 per ton?

A. Yes, sir.

Q. What raisins were available at that price? I am assuming you were operating under the program. If you had operated under the program, what raisins were available at that price?

A. Under the program, only 30 percent of the raisins [fol. 240] were available.

Q. That is, 70 percent were set aside in these pools?

A. Yes, sir.

Q. Only 30 percent was available?

A. Yes, sir.

Q. And the sweatbox price, from that time on, was $55?

A. $55 or better.

By Mr. Aten:

Q. Were any raisins available, Mr. Brown, at a less price, for the filling of those contracts, than $55 per ton?

A. No, sir.

Mr. Bowers: We object to that as indefinite, as to what time he is speaking of. The contracts were made in May.

By Mr. Aten:

Q. As a matter of fact, could you, at the time the contracts called for delivery, have filled the contracts from the 30 percent free tonnage, so-called, under the program, if you had operated under it? Were those raisins available?

Mr. Bowers: We object to that as calling for a conclusion of the witness and incompetent. Obviously, under the stipulation as to the amount of tonnage, there were sales, so they must have been available.

Judge Beaumont: What you are doing, you are asking him to determine the matter without giving the facts. You are asking him if it was available. I don't believe the objection was made on that basis. However, the objection is overruled. You may answer.

A. I tried to buy raisins at that time. There was no [fol. 241] money here for raisins under the prorate program, and the growers were not inclined to sell.

By Mr. Aten:

Q. That is, the grower had a disposal of 70 percent, under the program, before the 30 percent was available?

A. Yes, sir.

By Mr. Aten:

Q. Were there raisins available, in the 30 percent free tonnage at that time, sufficient for you to fill your contracts?

A. No, sir.

By Mr. Aten:

Q. You have testified that you produced 200 tons——

A. Yes, sir.

Q. —as a grower. Then if you operated under the program, what amount would you have to pay into the program for its operation?

A. $150.

Q. If you had operated under the program, what extra cost, if any, did the program impose on you in the purchase of raisins?

A. $1.50 per ton extra.

Q. $1.50 per ton extra. In addition to these 562½ tons that you would have had to purchase to fill these contracts, what other tonnage had you anticipated purchasing during the year in the conduct of your business?

Mr. Bowers: We object to that as purely incompetent, as to what his anticipations might have been.

Mr. Aten: If the Court please, it is alleged that he anticipated shipping 2500 tons in addition to the actual contracts. This man is in business and has been in business [fol. 242] for many years. He should be allowed to state his anticipated business.

Mr. Bowers: It is a well recognized rule that anticipatory profits or losses are not competent in determining the element of damages.

Judge Beaumont: I think it should be overruled. You may proceed.

By Mr. Aten:

Q. What tonnage had you anticipated?

A. I expected to ship, during the season, 3,000 tons of raisins.

Judge Yankwich: That is based upon your average for a period of years, is it?

A. That is based on my tonnage for the prior year, or 2,000 tons, with an anticipated increase.

By Mr. Aten:

Q. Mr. Brown, I will ask you to summarize, then, what you have already said. What is the total of the difference between operating under the program and without it, from what you have said, summarizing the figures?

Mr. Bowers: We object to that. He has already given the figures. It has been asked and answered.

Judge Beaumont: You may answer. Objection overruled.

A. It would figure about $5800.

By Mr. Aten:

Q. Let me ask you: What items figure that amount?

A. The figure of $10 a ton on 562½ tons, plus the $150 penalties, and plus $1:50 per ton extra buying cost.

Q. I don't believe that the total you gave is the total figure. What is your total figure?

A. $5800.

Q. I don't believe you figured your $1.50 a ton on your [fol. 243] 3,000 tons.

Judge Beaumont: This goes to show that Mr. Bowers' statement was very proper. It is a matter of computation.

Mr. Aten: It is a matter of computation, yes. I have prepared, if the Court please, in triplicate, and a copy for counsel, a summary of it, and also a summary of the principles governing the proof of the loss and damage, which I will submit at this time.

Judge Yankwich: Wouldn't it be more properly submitted in conjunction with your argument, as a summary of the evidence in the case?

By Mr. Aten:

Q. Mr. Brown, let me ask you this: In the transaction of your business do you or do you not transport the raisins from the producer to your plant? What is your custom in that respect?

A. We have equipment to haul the raisins from the grower, and in the majority of cases we haul the raisins from the growers' ranches.

Q. Do you mean by that you take delivery of the raisins on the farm; you get them on the farm and take the delivery there?

A. We haul them.

Q. In the majority of cases?

A. Yes, sir.

Q. These contracts that have been introduced, as counsel has pointed out, are made mostly with people in the state. Will you state where those were to go? For instance, take your American Trading Company contract. Where were those raisins to go? Where were they to be shipped to?

Mr. Bowers: We object to that as incompetent, irrele- [fol. 244] vant and immaterial. It is beyond the contract.

Mr. Aten: The contract doesn't state, I believe.

Mr. Bowers: The contract states they are to be delivered to them, f.o.b. its plant at Kerman.

Judge Beaumont: I think that objection should be overruled.

Mr. Aten: First I will ask the general question. I will withdraw that for the moment.

Q. In your business in 1939 and in your business in 1940 what percentage of your shipments of raisins went intrastate, that is, within the state, and what percentage went without the state?

Judge Stephens: Isn't there a stipulation that Mr. Brown's raisins took the usual course?

Mr. Aten: That is the fact.

Judge Stephens: Will there be any proof that they didn't take the usual course that is covered in the stipulation, and that a large percentage of his raisins did go out of the state, or were supposed to have gone out, at the time this contract was made?

Mr. Bowers: No, I don't think so.

Judge Stephens: Just the same as any other large amount of raisins?

Mr. Bowers: I don't follow the Court on that, in regard to the stipulation. The stipulation says that ultimately the bulk of the raisins that are used for human consumption are consumed by the ultimate purchaser or consumer out-

side the state. But there is no stipulation that the bulk of Mr. Brown's sales, or the bulk of any other sales by packers——

[fol. 245] Judge Stephens: I understand that, but that is exactly what I am asking. Do you contend that his raisins took a different course than that referred to as raisins in general?

Mr. Bowers: No.

Judge Stephens: It seems to me to be covered by the stipulation.

Mr. Bowers: We consider it is typical; that he made his sales; all were intrastate; and delivered them all intrastate.

Judge Stephens: I understand your point on that, but they would eventually leave the state.

Mr. Bowers: I think the bulk of them ordinarily left the state. I am not saying they did. There is no way of telling.

Judge Stephens: Your point is that as far as this contract is concerned, they may not have left the state?

Mr. Bowers: Yes.

Judge Stephens: But you don't contend——

Mr. Bowers: We don't deny that on the average 90 percent or so, that were used for human consumption, went outside of the state.

Judge Stephens: And that applies to the raisins that are immediately being inquired about?

Mr. Bowers: As to their ultimate consumption, as far as I know, it does. I haven't any knowledge or any proof on it at all.

Judge Stephens: Will we so consider it?

Mr. Bowers: I don't know what else you can consider, because I don't think there is any way in God's world to [fol. 246] tell.

Mr. Aten: I think your Honor stated the matter correctly, as far as the law is concerned.

Judge Beaumont: As far as the facts are concerned, is there any disagreement here? If there is, I think Mr. Aten should proceed with his proof.

Mr. Aten: We are prepared to show that 90 percent, at least, of Mr. Brown's shipments under his contracts were to go directly out of the state, either into foreign countries or other states. While we think your Honor's statement——

Judge Stephens: Don't you mean to say "eventually," instead of "directly"?

Mr. Aten: No; I mean directly.

Mr. Bowers: We are not prepared to stipulate on that. Your statement about "eventually," that they eventually go there, I agree with Judge Stephens' statement that eventually the stipulated figures would apply to any of the raisins; raisins of this plaintiff, or any other, as far as I know.

Judge Yankwich: Mr. Bowers, do you intend to go beyond the limitation that you have on page 5, lines 1 to 7; that is, that the individual producer never knew whether his particular raisins were going to go into interstate or intrastate commerce, and that on the basis of the doctrine of averages, probably the same percentage went into interstate commerce for each particular producer, because you couldn't segregate those that were kept in the state and those that went out; isn't that right?

Mr. Bowers: That is correct.

Judge Yankwich: Isn't that the extent of your limitation?

[fol. 247] Mr. Bowers: That is correct.

Judge Yankwich: Then, of what materiality is it whether these particular raisins would ultimately——

Mr. Bowers: I don't think it is material.

Judge Yankwich: The effect of interstate commerce isn't determined by what became of the raisins that this witness handled, but what the prorate program achieved.

Judge Stephens: I think it does, as to whether there was a damage.

Judge Yankwich: Yes, except for damages.

Judge Stephens: Nobody is contending here that the 5 or 10 percent, that is wholly consumed in the state, went to make up the raisins here?

Mr. Bowers: No, there is no contention about that.

Mr. Aten: While we thought it wasn't material, there was some contention about it and some suggestion for it. We didn't want to leave any question about it at all.

Judge Beaumont: Proceed, Mr. Aten.

By Mr. Aten:

Q. What percentage of the raisins handled by you in the year 1939 went into interstate commerce?

Mr. Bowers: We object to that, if the Court please, as immaterial.

Mr. Aten: Well, we have also covered that by the stipulation.

Judge Beaumont: It is sustained. I think counsel has withdrawn the question.

By Mr. Aten:

Q. What percentage of the raisins, provided by these contracts in evidence, were shipped by you out of the state?

[fol. 248] Mr. Bowers: Just a moment. We make the same objection to that. The contracts speak for themselves.

Mr. Aten: I am asking him directly.

Judge Stephens: You are asking what percentage of these raisins, that are the subject of these contracts, went into interstate commerce. That connotes that, by the terms of the agreement——

Mr. Bowers: Yes.

Judge Stephens: I think we have an understanding. You are liable to undo it.

Mr. Aten: I am not afraid of the fact of undoing it if we can get the facts before the Court. If the Court please, there is no provision in the contract as to where they shall be delivered or shipped, or anything about them.

Judge Beaumont: As I understand the question, the use of the expression, "covered by the contract," was only for the purpose of identifying particular raisins?

Mr. Aten: That is right, as to where these particular raisins, covered by these contracts, were to be shipped.

Judge Beaumont: Reframe your question so there will be no question about the meaning of any of the terms that you use, Mr. Aten.

Mr. Aten: I think, since it seems to be a matter of controversy, if I took each individual contract it might be better. I tried to do it in one group, so to speak, but if we take the individual contracts it might be better.

Judge Beaumont: Are you in a position to ask him if he knew where certain shipments of raisins were destined?

Mr. Aten: Yes.

Judge Beaumont: And if they were shipped? Did he [fol. 249] actually ship them?

Mr. Aten: Where they were to go.

Judge Beaumont: If he actually shipped them, that covers it.

Mr. Aten: What happened afterwards, either to increase or diminish the damage, is immaterial. It is a question as to where they were to go.

Judge Beaumont: Well, you proceed.

By Mr. Aten:

Q. Take the contracts with the Dried Fruit Distributors of California: Where were those raisins to be shipped?

Mr. Bowers: Just a moment. We object to that as indefinite as to the statement, "where they were to be shipped." As to where they were to be shipped under the contract, or by Mr. Brown, the contract itself speaks for that. If this is to be a separate shipment by somebody else, then we want the question to definitely designate that.

Judge Stephens: Let me ask a question of the witness.

Mr. Aten: Yes.

Judge Stephens: You did not have any understanding with anybody that any of these raisins should be shipped out of the state, did you?

A. It was understood that they were to be shipped out of the state, your Honor. For instance——

Judge Stephens: Well, can't you just answer the question? We are trying to shorten it.

Mr. Bowers: I move to strike that answer as not responsive, as to what was understood.

Judge Stephens: Yes. The answer may go out. Did you have any understanding with any of these people that they [fol. 250] would ship them out of the state?

A. No, sir.

Judge Stephens: Did you care whether they were shipped out of the state or not?

A. Not particularly, no.

Judge Stephens: You just understand that they were going to go out of the state?

A. Yes.

Judge Stephens: What was the basis of your understanding that they were to be shipped out of the state?

A. My basis of understanding was on past performance of contracts made with these same people, that they were shipped out of the state.

Judge Stephens: Just because they had purchased raisins before and shipped them out, you assumed that they were going to take the same course?

A. Yes, sir.

Mr. Bowers: We move that his understanding be stricken from the record.

Judge Stephens: Yes. Now, if you will go back to the understanding we had awhile ago——

Mr. Bowers: Was there a ruling?

Judge Beaumont: Judge Stephens was questioning the witness, and a request was made by Mr. Bowers that the understanding should go out. Judge Stephens stated that it should go out.

Mr. Bowers: Does the Court rule that it does go out?

Judge Stephens: My questions were merely foundational.

Judge Beaumont: Then let the answer go out.

Judge Stephens: Let's see if we can't shorten it. Can't [fol. 251] we now say that each side admits that the raisins, which were the subject of these contracts that have just been introduced in evidence, would take the same course that is outlined in the stipulation?

Mr. Aten: We are willing to stipulate to that.

Mr. Bowers: Yes, we are willing to stipulate to that.

Q. Mr. Brown, the question of Muscat layers was left out of this stipulation. Will you state, when layer Muscats are brought into the packing house, how are they handled and what is done in putting them into the containers for shipment to commerce?

A. The layer Muscats are brought in from the vineyard into the packing house in sweatboxes, and simply lifted out of the boxes into the packing box.

Q. That is the complete operation, isn't it?

A. Yes, sir.

Cross-examination:

Q. Mr. Brown, when you made these contracts in May of 1940, that you have testified to here, the various ones that are introduced as exhibits, did you at that time have any raisins on hand to fill the contracts?

A. I had raisins on hand in the spring of 1939. I had other orders on hand calling for the delivery of 1939 crop raisins.

Q. How much raisins did you have on hand at the time these contracts were made, of the 1939 crop?

A. I don't recall the exact amount of raisins I had on hand at that time.

Q. Did you have any idea at that time of the amount of raisins on hand and in the state, of the 1939 crop?

[fol. 252] A. The figure that was given out by the state, as of September 1, 1939, was 70,000 tons of raisins in the hands of the packers.

Q. So that, as a matter of fact, at the time you made these contracts, and at least up until September 1, 1940, there were on hand in the state available some 70,000 tons, which could have been utilized for the purpose of filling the contracts covering 1939 and 1940 raisins, or 1939 or 1940?

Mr. Aynesworth: I object to it as incompetent, irrelevant and immaterial; not bearing upon any issue in the case. The only question is whether or not, after the program went into effect, those were available.

Mr. Bowers: I don't think so. He has been questioned here about the making of contracts in May, calling for future deliveries, and the fact that he has been damaged because he couldn't get raisins to fulfill the contracts. We propose to show that there were plenty of raisins available at that time.

Mr. Aynesworth: I submit that the only matter in controversy is whether or not, from the time the program went into effect, there were available raisins. As to whether they were available prior to that time, or whether he had them available prior to that time, is immaterial.

Judge Beaumont: Objection overruled.

Mr. Aynesworth: Will the Reporter read the question?

Judge Beaumont: Read the question, Mr. Reporter.

(Question read by Reporter.)

A. There were——

Judge Beaumont: Just answer that yes or no. Then you [fol. 253] may explain your answer, Mr. Brown.

A. Yes. There were raisins in the hands of the growers in the early part of the 1939 season. As the season went on those raisins were bought by the Commodity Credit Corporation and larger packers.

By Mr. Bowers:

Q. Mr. Brown, do you know at what time the 1940 crop of raisins came on from the producers?

A. The 1940 crop was exceptionally early and some raisins were delivered in the early part of September.

After the program was announced the growers stiffened in their ideas of price and there was no money here available for them, and they were not inclined to sell.

Q. Do you know approximately what the 1940 crop of raisins was, in tonnage?

A. It was approximately 160,000 tons.

Q. And those were available, in the hands of the producers, from the early part of September on?

A. Under the program only 30 percent of those were available.

Q. Under the program 30 percent of those could be delivered by the growers to the packers, or anybody else that wanted to?

A. You were permitted to deliver them, but there was no money here for 70 percent, and you didn't want to deliver them.

Q. Do you know whether any raisins of the 30 percent were sold by these producers in September 1940?

A. I think there were a few sold, yes, sir.

Q. Were there any sold in October 1940?

A. I think a few were sold, yes, sir.

[fol. 254] Q. Any in November 1940?

A. Yes, sir.

Q. And in December 1940?

A. Yes, sir.

Q. In other words, during all times, from the time that the raisins were ready in the first part of September 1940, sales were being made by the producers?

A. The producers were reluctant to sell, because there wasn't any money here. There was an occasional grower that had to have money, and in a dire attempt to get money there were a few sales made.

Judge Beaumont: Just let the answer go out. Read the question, Mr. Reporter. Please listen to the question, Mr. Brown. Just answer yes or no, and if it is necessary you may explain your answer.

(Question read by Reporter.)

A. No.

By Mr. Bowers:

Q. You say no sales were made by producers?

A. No; referring to "during all times"; raisins were not being sold by producers.

Q. What do you mean by that?

Judge Beaumont: If you will have the question read, Mr. Bowers, you will find that apparently he has made the proper answer, insofar as the witness' viewpoint is concerned. You said "during the time."

Mr. Bowers: I said "during all those times."

Judge Beaumont: He said, "No; all the time sales were not being made."

Mr. Bowers: I want to pin that down, now.

[fol. 255] Judge Beaumont: Well, proceed.

By Mr. Bowers:

Q. When you say that during all of that period, from September on, the sales were not being made by producers, do you mean that no sales were made during September, or any particular period?

A. I mean that at all times the raisins were not being sold and were not available for sale.

Q. Can you tell me any time in September when these raisins were not being sold and were not available for sale?

A. Prior to September 7th there was an on-rush of the growers, who were not favorable to a prorate plan, to sell their raisins, because they could sell them 100 percent. They rushed those into the packing houses. Then there came a lapse, from September 7th until about October 1st, when very few raisins were being sold by the producers.

Q. You say you kept up, during that time, with the raisin conditions, the same as you had prior thereto, did you not?

A. Yes, sir.

Q. Can you tell us now approximately how much of that crop was sold by the producers, prior to September 7th, of the 1940 crop?

A. I estimate about 20,000 tons were sold.

Q. And what amount were sold during the month of September 1940, subsequent to the 7th?

A. Well, that was my answer—subsequent to the 7th?

Q. Yes.

A. You mean following the 7th?

Q. Yes, subsequent to the 7th.

A. I can't give you the amount in exact figures, but [fol. 256] I tried to buy raisins and very few of the growers were inclined to sell. As I stated before, there was

no money here available. The clearness of the program, which they had supposed all the way along, was not clear to them, and they wanted to wait and see what the program was going to be.

Q. Well, you made no effort to obtain any of these 20,000 tons prior to September 7th, in order to fulfill your two- or-three-hundred ton requirement, did you?

A. Prior to that time I was busy harvesting my own crop.

Judge Beaumont: What is the answer; is it yes or no? Read the question, Mr. Reporter.

(Question read by Reporter.)

A. I made some effort; yes, sir.

By Mr. Bowers:

Q. What effort did you make, Mr. Brown?

A. I contacted growers.

Q. Who had raisins?

A. Yes, sir.

Q. Did they have enough to meet your requirements?

A. I expected the growers that I saw had enough raisins, in entirety, to meet my requirements; yes.

Q. Wouldn't they sell to you?

A. They didn't sell to me.

Q. Did they refuse to sell to you at any price, or was it because they refused to sell to you at the price you offered?

A. Announcement had been made about August 30th that we would have a program, and many of the growers wanted to wait and see what the program was.

Q. During that period, prior to September 7th, what was [fol. 257] the market price, the sweatbox price?

A. For 100 percent?

Q. For raisins; yes.

A. For 100 percent of raisins the sweatbox price was $47 and $48 per ton, for the 100 percent.

Q. And did you offer the growers $47 and $48 a ton for their raisins?

A. I tried to buy some raisins at $45 per ton.

Q. In other words, the market price at that time was $47 to $48 a ton, and the reason you couldn't get raisins was because you wouldn't pay more than $45 a ton?

A. No, sir; that is not entirely it. I talked to the growers and they said that they wanted to wait and see whether we

were going to have a program for sure. And Mr. Parker had assured us that if there was any objection to a program, even in a minority, that there wouldn't be any program. And the objection was borne out by the fact that of 3,000 voters in this program, 600 voted for it and 2400 voted against it.

Mr. Bowers: We move to strike that out as not responsive to the question.

Judge Beaumont: Motion denied. It is an explanation to the answer.

By Mr. Bowers:

Q. Mr. Brown, at least during the period prior to September 7, 1940, there were growers who sold 20,000 tons, you state?

A. That is my estimate; yes, sir.

Q. Did you talk to any of the growers who sold any of these raisins?

A. I have talked to those growers; yes, sir.

[fol. 258] Q. At that time?

A. Perhaps I talked to some of them at the time.

Q. Did you attempt to buy any raisins from any of these growers?

A. I said a few moments ago that I did attempt to buy them.

Q. In other words, you attempted to buy raisins from the same growers who sold their raisins at that time?

A. I attempted to buy raisins from growers.

Q. Well, did you attempt to buy raisins from any of these growers who actually sold their raisins during that period?

A. I believe that I did.

Q. Well, you believe that you did. Did you?

A. I believe that I did; yes, sir.

Q. But you didn't offer more than $45 a ton to any of these growers?

A. Not at that time.

By Mr. Bowers:

Q. Now, Mr. Brown, did you attempt to make any purchases in September, after September 7th, of raisins?

A. Yes.

Q. Were you able to obtain any?

A. Yes.

Q. How much did you obtain then?

A. I bought, I believe, three crops during the month of September.

Q. You bought what?

A. Three crops.

Q. Can you give that to us in tonnage? Three crops [fol. 259] doesn't mean anything.

A. About 75 or 80 tons.

Q. About 75 or 80 tons?

A. Yes.

Q. Were you able to buy any more during that period?

A. Absolutely not.

Q. What was the market sweatbox price during that period?

A. $55, under the program.

Q. What did you offer?

A. $50 for 100 percent.

Q. You made no higher offer than that?

A. I did not.

Q. During the month of October 1940 do you know approximately how many tons of free tonnage raisins were sold by producers?

A. In the early part of the month of October comparatively little of the 30 percent was sold by producers.

Q. Can you just answer the question as to approximately how many tons?

A. I can't tell you.

Q. You have no idea at all?

A. I have an idea, because I contacted the growers and they were selling very, very reluctantly.

Q. Would you say that there were more or less sold in October then there were in September?

A. I would say in the early part of October that—the first half of October, that perhaps about as many as were sold during the month of September, from the 7th on.

Q. In the last half of October how many?

[fol. 260] A. The newspaper publicity was such that the growers realized that——

Q. Just a moment, Mr. Brown——

Judge Beaumont: Just answer the question.

By Mr. Bowers:

Q. Without giving us a lecture, can you answer the question?

A. May I have the question?

(Question read by reporter.)

A. I can't give you the number of tons.

Q. Was it more or less than the first half?

A. More.

Q. Did you endeavor to get any of those raisins?

A. Yes, sir.

Q. What was the market sweatbox price during October?

A. The sweatbox price, under the program, continued at about $55 a ton, and an occasional offer at $57.50 per ton was offered.

Q. Did you make any effort to get any of those raisins?

A. I bought some raisins in October; yes, sir.

Q. Did you make any effort to get any of these raisins that were being placed on the market, by these producers, at $55 or $56 per ton?

A. I made an effort and bought some raisins during the month of October.

[fol. 261] Q. Did you purchase any during October?

A. I purchased one crop during the first half of October.

A. The last half of October I had a restraining order placed against me by the Prorate Zone and couldn't buy any raisins during that period.

By Mr. Bowers:

Q. How many tons did you purchase in October?

A. I purchased about 40 tons during the first half of October.

Q. How many tons of raisins of the 1940 crop did you purchase altogether, Mr. Brown?

Mr. Aten: I object to that as incompetent, irrelevant and immaterial; not relevant to the issues, as to any raisins purchased after the time of the filing of this action, about the middle of October, for reasons already stated.

Judge Beaumont: Objection overruled.

A. I purchased about 700 tons of raisins.

By Mr. Bowers:

Q. Of the 1940 crop?

A. Yes, sir.

Q. In addition to the 200 tons which you produced yourself?

A. Yes, sir.

Q. Did you fulfill these contracts, then? Did you deliver these raisins under the terms of these contracts?

A. No.

Mr. Bowers: Mr. Brown you stated that you anticipated doing a business of some 3,000 tons during 1940 season?

A. Yes, sir.

Q. Had you at any time previous done business of that amount, during a current season?

[fol. 262] A. No. I would like to explain it in this way: That I just started in the packing business for myself during the early part of 1939 and sold 2,000 tons, and anticipated that I could sell 3,000 tons during the 1940 crop season.

Q. In other words, your basis was the fact that during the 1939 season you had done a business of 2,000 tons, and so you were hopeful that you would increase your business by 50 per cent the following season?

A. I felt that I could sell 3,000 tons during the 1940 crop season.

Q. You say it was customary among the packers to contract in the early part of the year for deliveries in the fall of the year?

A. Yes, sir.

Q. Was that done on the basis that the deliveries would be made right after the fall crop had come in and was ready?

A. Yes.

Q. And you anticipated that the producers, having their crops all on their hands at that time and needing money, that you would be able to purchase the raisins at a fairly reasonably low price and fulfill the contracts?

A. Yes, with this explanation: That a great many of the growers sell their crops early. There are a portion of the growers that hold their crops. Perhaps 35 per cent of the growers hold their crops, which acts as a stabilizing feature, in my opinion, better than any program that we might have

that carries these raisins on into the new year, waiting for an advance in price.

Q. Then you would say, from your connection with the industry and with the growing of raisins, the great bulk of [fol. 263] the raisin growers were forced to dispose of their crop, just as soon as it was ready, in order to get money for financing?

A. A great many of the growers, perhaps two-thirds of them, sold their crops early. I don't believe they were forced to sell them early.

Q. In other words, you are not familiar enough with the industry to know the situation among the growers in that respect?

A. I feel I am familiar enough with the situation, after being in the business for 25 years, to say that two-thirds of the growers sold their crop of raisins before the turn of the year, leaving a third of the growers holding their crop, to act as a stabilizing factor, through the crop season.

Q. And they primarily dumped them on the market in that period because of the fact that they were pressed for money, didn't they?

A. I believe that all growers sell their crops because they need money to pay for taxes and other bills pertaining to the harvesting and so forth.

Q. And so it is the practice among the packers, as you state, upon that basis to make these contracts for future deliveries?

A. It was common practice for the packers to make early contracts for deliveries in the fall.

Judge Beaumont: Is it your purpose to pursue that particular phase of the testimony any further, Mr. Bowers?

Mr. Bowers: No, not particularly on that.

Q. You knew, at the time that you made these contracts, that a raisin program was in existence; that a seasonal program had been operated in 1938, didn't you?

[fol. 264] A. I knew that a program had been operated in the season of 1938, because I had delivered to that program and I had not received my money for 20 per cent of my raisins.

Q. Did you know at that time whether or not there was any discussion or movement for the adoption of a seasonal program for 1940?

Mr. Aynesworth: I object to that on the ground that it is incompetent, irrelevant and immaterial; not responsive to any issue, whether he knew it or didn't know it.

Judge Beaumont: It appears to me that it is immaterial, Mr. Bowers. Quite frequently the court doesn't know what a cross examiner has in mind.

Mr. Bowers: I have no objection to disclosing it to your Honor. I think the situation is apparent that Mr. Brown sold short on the market, on the gamble that there would be no prorate program and there would be a bunch of raisins dumped on the market that he could pick up cheap. That is the sole purpose of it.

Judge Beaumont: Objection sustained.

By Mr. Bowers:

Q. You stated that you would have to pay $1.50 a ton for all the raisins you purchased, in excess of other costs, under the program?

A. I stated that owing to the small supply of raisins available that the buying cost was increased $1.50 per ton in the purchasing of raisins.

Q. What do you mean by "buying cost"? What particular buying cost?

A. The actual cost of buying these raisins. The supply was short. The growers were not inclined to sell. We had watchmen that were circling our place day and night in an [fol. 265] attempt to intimidate both us and what growers we could do business with, and it required the extra cost of $1.50 per ton.

Q. Were you paying for those watchers, or whatever they were?

A. No, I wasn't paying for them directly.

Q. Then, how did they cost you $1.50 a ton extra?

A. Because the growers were intimidated by the fact that these men were, up until the middle of October, sitting in our yard watching every operation that we made and that they made in disposing of the raisins.

Q. So you felt you paid them $1.50 a ton more to assuage their feelings, because they had to come into your yard and there was somebody sitting there watching them?

Judge Beaumont: That is only argumentative, Mr. Bowers.

Mr. Bowers: I agree with the court.

Q. Did you pay any of these growers $1.50 a ton more?

A. We paid some more for their raisins on that basis, and then we——

Q. May I ask you to explain? You say you paid more on that basis. On what basis do you mean?

A. If the grower was not inclined to sell, due to those circumstances, we paid him more in an attempt to get the raisins; and then we had to make telephone calls and trips back to the various growers in an attempt to buy their crops, which all added to the cost of buying.

Q. Those crops that you were attempting to buy, you mean that your purchases were attempted to be made contrary to the provisions of the program?

A. Yes, sir.

[fol. 266] Q. And that was the reason of this extra trouble and of the so-called intimidation?

A. Well, these watchmen were there. That caused the direct intimidation.

Q. As a matter of fact, did you make any attempt at all to buy the certificated free tonnage raisins from the producers that had them?

A. Not at that time.

Q. Did you at any time?

A. I attempted to buy raisins, but not under the program.

Q. In other words, Mr. Brown, your difficulty was in getting hold of raisins that were not under the program?

A. I was offering to buy raisins 100 per cent.

Q. When you say "100 per cent" you mean by that that your offer was conditioned upon the grower delivering to you his entire crop of raisins, contrary to the provisions of the program, which required 70 per cent to be delivered to the pools?

A. Yes, sir.

Further Cross-examination.

By Mr. Walton:

Q. Mr. Bowers asked you at one time this morning how many 1939 crop raisins you had on hand during or about the month of May, 1940. I believe you said you didn't know. Is that your answer?

A. I believe that was my answer, yes.

Q. That is your answer now?

A. Yes.

Q. Have you any idea?

A. I am a small factor in the raisin business and my [fol. 267] finances are limited, and I had bought all the raisins that my finances would afford.

Judge Beaumont: Let the answer go out. Read the question, please, Mr. Reporter.

(Question read by reporter.)

Judge Beaumont: Just answer it yes or no, Mr. Brown, then if necessary you may explain your answer.

A. Yes, I have an idea.

By Mr. Walton:

Q. Could you approximate the amount?

A. I believe so.

Q. Will you do so, please?

A. I believe 100 tons.

Q. As I understand you, then, at that time, in May, you sold these contracts under which you obligated yourself to deliver at $60 a ton; that is true, isn't it?

A. Yes.

Q. That was your testimony this morning?

A. Yes, sir.

Q. I understood you to say, or I will ask you if it isn't a fact that at that time 1940 crop raisins were available in the field at $45 a ton?

A. Yes, sir.

Q. You didn't avail yourself of that? You didn't buy any on contract at that time to cover these sales that you had made?

A. Yes; I bought all the raisins that my finances would afford. I was a small operator and, naturally, didn't have large capital, like some of the large packers. So I bought all my finances would afford.

Q. How much was that; towards covering these contracts, [fol. 268] I mean?

A. Just as I have estimated; about a hundred tons.

Q. When did you make that estimate?

A. Just a few moments ago, in answer to your question.

Q. My question was with respect to 1939 crop raisins that you had carried over.

Judge Beaumont: And had on hand about the month of May, 1940.

Mr. Walton: Yes.

Q. Didn't you understand it that way?

A. I understood you asked me how many raisins I had in May, of the 1939 crop.

Q. Yes.

A. I estimated that at a hundred tons.

Q. Yes. Now, I have left that subject. I am asking you now how many raisins, if any, you bought of the 1940 crop at the field price of $45, to cover your sales at $60?

A. I didn't buy any, because I had my own crop coming on and at that time there was no talk of a program. And even as it later developed, with a program, I wouldn't have been able to use those raisins. The grower's contract would have been voided under the 1940 crop program.

Q. Well, of course, you didn't know that in May?

A. No, sir.

Q. Then your answer is, I believe, that you did not buy to cover those sales at $60; that is correct, isn't it?

A. Yes. 1940 crop?

Q. Yes.

A. Yes.

Q. You spoke of the operation with respect to Muscat [fol. 269] layers, and as I have your testimony you stated that Muscat layers are simply lifted out of the box, in which they are delivered, into another or packing box. Is that the complete operation?

A. Yes, sir.

Q. Nothing else is done to them?

A. No, sir.

Q. How long have you been a processor yourself?

A. I am not a processor. I am a grower-packer.

Q. You are not a processor of raisins?

A. I am a grower-packer.

Q. Are you a processor of raisins?

A. I don't process raisins.

By Mr. Walton:

Q. With regard to what is done with Muscat layers, during the time you have operated under this Processor's License have you handled Muscat layers?

A. No, sir.

Q. You base your statement and your testimony in that respect, then, on your 25 years' experience in connection with the raisin industry?

A. Yes, sir.

Q. And there is nothing done to Muscat layers except to change them from one box to another; is that correct?

A. That is correct.

Q. And that is a universal custom?

A. It is a custom based on my experience, yes, sir.

Q. You have a comprehensive experience, over the last 25 years, on all of the methods of handling Muscat layers, haven't you?

A. I have been identified with firms that handle Muscat [fol. 270] layers in large quantities.

Q. Do you make the positive statement that they are not handled other than as you have indicated, or simply that you don't know?

A. Well, I do know as to the majority of the handling of layers. You ask about a universal custom. The custom, so far as I know, is that all that is done to those layers is that they are hauled in from the vineyard and they are taken out of the box and put into a packing box.

Q. And that is the complete operation, as you stated this morning?

A. Regarding layer Muscats.

Q. Yes. And that is the universal custom of all the packers of Muscat layers; is that correct?

A. Yes, sir.

Redirect examination.

By Mr. Aten:

Q. Mr. Brown, going back to the inquiry made by Mr. Walters as to the 100 tons of raisins you had on hand in May of last year, he asked you, in that connection, if you went out and purchased other raisins of the 1939 crop to cover these contracts, and you answered, "No". What did you do with the 100 tons that you had on hand in May?

A. I filled orders that I had for those raisins.

Q. Did you, from May until the program went into effect, continue to buy and sell raisins of the 1939 crop?

A. Yes, sir.

Q. How many raisins of the 1939 crop would you have on hand at any definite time during that period?

A. 100 to 200 tons.

Q. And did you state why you didn't buy to fill these [fol. 271] orders in October? Why didn't you buy to fill these orders in October, November and December, under the contracts that have been introduced here?

A. Because my finances were used in the buying and selling of these current orders.

Q. And you kept a continuous business going, but you never had more than 200 tons at any one time; is that correct?

A. That is correct.

Q. Going back to the question concerning the 70,000 tons held over, that you say was on hand in August, or September 1st, that is, the holdover of the 1939 crop, I believe you stated that by September 1st that holdover had been purchased and was in the hands of the packers; is that correct?

A. Yes, sir.

Q. You stated in that connection that it has been the custom and is the custom for packers to buy one from the other. Now, why didn't you buy some of those raisins in the hands of the packers to fill these contracts that would take 1939 raisins? Why didn't you buy from that source?

A. I tried to buy from that source. The packers wouldn't sell the raisins in sweatboxes.

Q. They would sell them only as a packed raisin?

A. Yes, sir.

Q. And at what price?

A. 4 cents a pound.

Q. Then, there was no object in buying?

A. No, sir.

Q. That is, you wouldn't diminish or cut down the loss any by doing so?

[fol. 272] A. No, sir.

Q. What happened to the sweatbox price of the 1939 crop at the time the program of 1940 went into effect on September 7, if anything?

A. The sweatbox price stiffened and jumped to the field price of the 1940 crop.

Q. That was $55?

A. $55 a ton.

Q. So you would have had to pay the same price, as you would have had to pay under the program, for sweatbox raisins?

A. Yes, sir.

Q. You testified this morning, in your direct examination, that if you had operated under the program—not as you actually did operate—that if you had operated under the program the additional cost of buying, under the program, was $1.50 a ton. Would that have been as to you and as to all other packers?

A. The cost of buying, to all packers, was increased.

By Mr. Aten:

Q. Then, it wasn't because of the watchers and those matters out around your place that increased that cost, was it? That is, it was an increase to all packers, wasn't it?

A. Yes.

Q. Can you explain why that was?

A. There was only 30 per cent of the total crop to buy. As to the other packers, they were having just as hard a time buying and as much trouble buying their raisins and that, of course, increased the price of buying.

Q. Is this or is it not a fact: Did they not have to pur-
[fol. 273] chase 100 tons in order to get 30?

A. Yes, sir.

Q. And the buyers were paid on that basis, were they not?

A. Yes.

Judge Yankwich: I think it should be stated for the record that every member of the court read, before going on the bench, the statement of facts which gives the operation of the pool and the method of buying and selling. And regardless of what this or any other witness may say, the agreed facts show the method of operation.

Mr. Aten: The plaintiff rests.

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Walter K. Hines, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Walter K. Hines.

Direct examination.

By Mr. Walton:

Q. Where do you live?

A. Fresno.

Q. What is your business or occupation?

A. Sales department, Sun Maid Raisin Growers.

Q. What is the Sun Maid Raisin Growers?

A. A cooperative.

Q. A cooperative. For what purpose was it organized? What is its business?

A. For the handling and receiving growers' raisins, and selling.

Q. The cooperative receives——

A. Processes and ships and sells.

[fol. 274] Q. —and sells raisins? How long have you been connected with that organization?

A. 22 years.

Q. What was your first connection with them?

A. Shipping clerk in the Dinuba Plant.

Q. What was your next situation or position with Sun Maid?

A. Superintendent of the plant at Cutler.

Q. Superintendent of a plant at Cutler. By "plant" what do you mean?

A. A raisin packing plant.

Q. What was your next connection with Sun Maid?

A. I was transferred into the main office at Fresno.

Q. What were your duties in that connection?

A. At the time, supervisor of the plant account.

Q. Of the plant account?

A. Of the plant account.

Q. About how long did you stay in that position?

A. Until 1926.

Q. What was your next position with Sun Maid?

A. I was transferred to the operating division that had charge of all manufacturing plants.

Q. Of all manufacturing plants. By the way, Mr. Hines, how many of those plants are there?

A. Now we have—I will have to count them in my mind.

Q. All right.

A. Seven, at the time.

Q. You have seven?

A. Right now at present.

Q. You have seven in operation?

[fol. 275] A. At the present.

Q. Are there any other plants or factories which the Sun Maid owns but which are not now presently operating?

A. There are.
Q. How many others are there?
A. I think about seven. I am not sure of that.
Q. About seven more?
A. I am not sure of that. Yes.
Q. What was your next connection with Sun Maid?
A. I was made operating manager.
Q. I mean after that.
A. I was transferred to the sales division.
Q. Are you now in the sales division?
A. I am.
Q. How long have you been there?
A. Since 1935.
Q. What position do you hold in the sales division?
A. Assistant sales manager in charge of products administration; that is, inspection of the fruit and like of that; finished products.

Mr. Walton: If the court please, I have placed on the blackboard a chart which I would like to now have marked Defendants' Exhibit 1 for identification.

Judge Beaumont: Let it be marked Defendants' Exhibit A for identification.

Mr. Walton: Exhibit A.

Q. Now, Mr. Hines, I will ask you to explain what this chart is and what it shows.
A. That chart there is drawn up and shows the mechanical procedure in processing raisins.
[fol. 276] Q. And by raisins——
A. The Thompson Seedless raisins.
Q. That Thompson Seedless is a natural seedless raisin?
A. Natural seedless raisins.
Q. Natural seedless raisins.
A. As they are delivered by the producer.

By Mr. Walton:

Q. Mr. Hines, just briefly explain this diagram; tell what they do to these raisins and point out the different processes——

Judge Stephens: No; the different things they do.

By Mr. Walton:

Q. The different things they do. First, what is this?

A. The first picture here in the diagram is a truck, a vehicle for delivering the unstemmed natural raisins to the plant that is to handle them.

Q. That is at the upper left-hand corner of the exhibit?

A. The upper left-hand corner. Next in our process, a sample is taken from the load. That is to be typical of the contents of the entire load. That is tested over a sand machine that sifts out the loose sand that is contained in the unstemmed raisins. That is for the purpose of arriving at the approximate percentage of sand that is included in a load, so that it can be deducted from the grower's weight. Next, the sample is taken and put through a stemmer. The stemmer has the operation of separating the dry, brittle stem from the raisin as it is delivered to us from the grower. A small sample is put through this machine which, through the action of air, separates the stem from the raisin after they have been broken apart by a cylinder in a concave screen.

[fol. 277] Judge Stephens: Are you now taking a sample from the truck; taking it clear through?

A. The sample has been taken from the truck.

Judge Stephens: The same sample?

A. Yes. And after having broken the dry, brittle stems from the raisins, the raisins are elevated up to a shower. The stems and raisins are commingled. They are put into a pan that shakes them and simultaneously carries them forward where they drop over the end of a shower, you might say, like a thick water stream. They are subjected to a blast of air from underneath, which is set so it will toss out the stems, which are lighter than the raisins, and the raisins fall down.

By Mr. Walton:

Q. In response to Judge Stephens' question as to the raisins in this waste tester; that was just a sample?

A. I am still talking about the sample.

Judge Stephens: What I want to get, is it the same raisin that keeps going?

A. It is the same load.

Judge Beaumont: It is the same batch of raisins you put in for the purpose of the test?

A. Yes. Those raisins that are carried over, they are

caught into a container which is later weighed to determine the quality of the delivery. The stems have been blown away—separated. Next, in case there is——

Judge Stephens: What is significant of the title "sugar tester"?

A. That is based on the theory of weight per volume. The more sugar there is the more they will weigh in this [fol. 278] container when measured full.

Judge Stephens: And that designation is under the machine you have been talking about?

A. The sugar tester, yes.

Judge Stephens: I am doing this for the record.

A. Next, the raisin is tested for the moisture content. They are then subjected to a pressure system which indicates, relatively, the moisture content of the raisins. That is on the theory that if a raisin contains more than 17 per cent moisture it won't keep properly in storage, in the raw form, until it is processed or until it is manufactured. Next, they are then taken—when ready to be manufactured and packed the raw raisin is taken from this load here, from which the sample was taken, and put through what we call a stemming operation. This operation here performs the same function on the total delivery that was performed here on the sugar tester. It goes through a concave cylinder screen that separates the stems that is carried to the top, and next are separated by wind, which is directed through here, and tosses the light stems, and any light and immature raisins in that load, over and out into what we call waste. The raisins themselves then drop down and are graded as to size and are put through a cap stemmer. This is called a capper and recleaner. The usual term is "stemmer." After they have been cap stemmed they go over a grader, in the case of Thompson Seedless, where there are three grades manufactured, and are graded as to size by a screen containing perforated holes of a certain diameter, so that the top or larger grade go into a carton pack, or a Fancy grade as we call it. The second grade on the second table is extracted for the bulk [fol. 279] or the choice grade. The small raisin that is carried through both the top screens onto the bottom screens are called the midgets or the bakers. So all Thompson raisins, after having had the stems and dirt removed, they are divided into three sizes. Next, after routine inspection, they are washed sufficiently to remove any rocks that might

be contained in the delivery or any sand that might adhere to the raisins, or any other foreign material that might have been in the delivery when originally made to us by the grower. From the washer they go into a drier, which throws out the surface moisture obtained in going through the washing operation. Next they go over a shaker and recleaner where any small cap stems, which were taken off there and carried on through, are taken out, or any flat raisins that go through the screens. Next, of course, samples are taken, where they go into the laboratory to determine whether they are fit for the particular pack in which they are going, and from there the fancy raisins are packed by automatic packaging equipment and the bulk raisins go out into 25 or 50-pound boxes or bags or 2 or 4-pound. paper bags.

Judge Stephens: What is the man with a spy glass?

A. He is looking over the discolored ones, to keep track of the quantity that may not be readily obvious to the eye as they go through in good volume; then, too, he looks for chipped (?) raisins. In going through the operation here, it may be the force of the equipment hitting the raisin to knock the cap stem off, it may bruise it, in which case they readily sugar. He takes that out here in the laboratory.. [fol. 280] Judge Stephens: The whole crop of raisins go through the moisture tester?

A. Only the samples that are taken.

Judge Stephens: That is what I want to know.

A. He checks the sample here.

Judge Stephens: Suppose he finds some that contain too much moisture?

A. In our case we embargo the fruit that has been packed during that particular time. I mean we hold up and re-examine it and repack it.

Judge Stephens: I see.

A. We have a crew of inspectors who go around to the different machines to check on the efficiency of the weighing of the automatic equipment and to see that the cartons and like of that are properly sealed and properly printed and in shape as we would have them go to the consumer, or the manufacturer in case of bulk. Then they pass on through the automatic sealing machine here. Then from there they are delivered to the cars for shipment, or truck.

Judge Stephens: I would like to ask about the time that is consumed in this process. Is there a necessity for a

rest period between all the processes, or is it done hurriedly?

A. In our case, there at Sun Maid, the bulk raisins, the 25-pound raisins, are carried through all of the equipment in approximately, say, eight minutes. In the case of cartons, possibly ten minutes from the time they leave the car in the raw state until they come out in the finished form for shipping in the car or truck.

[fol. 281] Judge Stephens: I don't understand. From the time they are taken off the truck they are packed in eight minutes?

A. In the case of 25-pound bags, yes, sir. From the time they are dropped into the stemmer until they come out in the shipping car, in the case of 25-pound cases.

Judge Stephens: You go out some place with a truck. Start from there.

A. The period I speak of—our growers deliver them to our plant.

Judge Stephens: From the time they enter your plant yard, or begin to unload from the truck, until the time they are packed is eight minutes?

A. From the time they are dumped from the truck until it hits the car, in the case of 25-pound bulk, is eight minutes.

Judge Stephens: They are not held in the warehouse for any length of time?

A. When deliveries are more than we are packing on any given date, the overflow goes back in the yard for later packing.

Judge Stephens: But in the ordinary method they are taken directly from the truck and put through the process?

A. They are taken directly from the truck, so far as is possible at the time. We do that as a matter of economy. The deliveries of raisins usually come in from the middle of September along through December, and that is what we use through the entire year.

Judge Stephens: Is there habitually a storage of the raisin after it is carted from the vineyard until you begin [fol. 282] your processing?

A. It works both ways.

Judge Stephens: Pardon me. What I mean by "processing" now is not the definition of that word, but what you have just been relating.

A. In so far as it is possible it moves, in practice, directly

through the flow line upon receipt from the grower. But if there is more delivered at a given time than the plant will take, that quantity is sent back for later use.

Judge Stephens: But ordinarily do you keep up with your deliveries in your processing?

A. No; we can't do that. We wouldn't do that, anyway, on account of setting back fruit that we use later on in our year. The growers deliver, over a period of three or four months, a quantity needed by us to pack over a 12-months' period.

Judge Stephens: What I am trying to get at, is there a storage period of the raisin in the rough before you refine it?

A: Not necessarily.

Judge Stephens: But is there actually?

A. In actual practice there are raisins set back in the raw form for later use.

Judge Stephens: You may hold them for several months——

A. Oh, yes.

Judge Stephens: After they come in on the truck, before you do a thing to them?

A. We do, and for this reason: In making the deliveries during a period outside of our regular receiving period, say, from the middle of June until September—we deliver [fol. 283] in June, July and August—we would want to deliver raisins that had been delivered in their raw form up to that time, because they keep better in that form.

Judge Stephens: You only refine your raisins into a marketable condition as the market indicates it will take care of them?

A. If we are able to do that, yes.

Judge Stephens: That is your rule?

A. That is the rule.

Judge Stephens: Thank you.

By Mr. Walton:

Q. Amplifying that a little, you always have a reserve supply, do you?

A. We do.

Q. Is that true of all of the larger packers?

A. It is.

Q. Mr. Hines, I will ask this question: You have ex-

plained this procedure as done at Sun Maid, and I am expecting, of course, you will answer that that is the best process, but leave that point out. Substantially, is this the practice of the other packers?

A. In so far as the check on the raisins, generally speaking, yes. Although, as you say, we have equipment there that is not used by other packers or processors.

Mr. Walton: I now offer this in evidence as our exhibit next in order.

Judge Stephens: As illustrative of the testimony given?

Mr. Walton: Yes.

Judge Beaumont: It may be received for that purpose and marked Defendants' Exhibit A.

Mr. Walton: We have another chart here showing Mus-
[fol. 284] cats. I think we can probably dispense with that.

Q. Is there any other important process relative to Muscats? Do you do anything additional to Muscats?

A. Yes. We artificially dry them and seed them. Whereas, we do not seed the Seedless raisin.

Q. In other words, there are two more steps?

A. Two more steps.

Judge Yankwich: These are sun dried at the time you get them?

A. Yes, sir.

Mr. Walton: If the court please, I have two more exhibits illustrative of the testimony. I was going to ask the witness to explain this.

(Discussion.)

Mr. Walton: If the court please, we desire next to present for identification a box, and I will ask that the witness, Mr. Hines, explain the meaning of the various sections of that box.

Judge Beaumont: Let it be marked for identification Defendants' Exhibit B.

A. Here is an exhibit that gives you, in approximate form, the grading of an unstemmed quantity of Thompson Seedless raisins. In the first compartment there you have a sample of the natural unstemmed Thompson Seedless with the stems and cap stems attached or commingled, and these raisins are raisins as they are delivered to us by the grower.

Judge Beaumont: That is in the compartment marked "Seedless from Grower."

A. Yes, sir. Next we have different types of waste that [fol. 285] is separated from this quantity of unstemmed Thompson raisins. Here in this compartment is chaff and sand. Here is cap stems. The next is stems, the larger stems.

Judge Beaumont: The first one says, "Seedless waste sand." The next one is "Seedless waste caps," and the next is "Seedless waste stems."

A. Yes.

Judge Yankwich: I was going to say "here and there" doesn't mean anything in the record. I would suggest you identify it.

Judge Beaumont: Well, he has done that.

A. Then, here represents the grading out of that unstemmed quantity there, when passed over the grader.

Judge Beaumont: When you say "here"——

A. This compartment.

Judge Beaumont: How is it labeled?

A. "Fancy Seedless", and the next compartment is "Choice Seedless", and the third one is the "Bakers Seedless." In other words, that is the disposition in size after having removed the waste shown in these compartments here, of the typical unstemmed quantity of natural Thompson raisins. These cartons here are representative of a particular grade. That is, the Fancy grade of Seedless. This is the way they go to the trade. The Choice grade and the Bakers are packed separately into 25-pound or 50-pound shipping containers, or into other consumer units, such as a 1-pound carton, or 2-pound bag, or 4-pound bag; whatever pack happens to be adopted.

Judge Stephens: I notice the raisin in its finished form seems to be brighter or fuller than the ones in the compart- [fol. 286] ment marked "Seedless from Grower". I want to ask whether or not there is any moisture added or subtracted?

A. There is very little moisture, if any, added in the washing process, because they are immediately put through a centrifugal machine that takes off the moisture that might be put on the surface as it passes through. But these are more uniform in size. When they pass through that blast of air it takes out any of the light, immature raisins.

Judge Stephens: There is no intention of increasing the moisture content in the processing?

A. Not at all.

Judge Beaumont: And the fact that they look a little brighter here is because in this process they are cleaned?

A. They are cleaned and washed.

Judge Beaumont: And it removes the sand and the little dust that may be on them, when they are washed, and it makes them look a little brighter?

A. Yes.

By Mr. Walton:

Q. I notice two packages of the finished product. State the designation and state briefly the difference between the two.

A. The carton packs?

Q. Yes.

A. One is a natural seedless raisin, and the other is a seedless raisin which has been made into what we term the Nectar Seedless raisin, which has been given a heat treatment and oil treatment—covered with oil.

Judge Yankwich: What is the object?

A. We believe it is a better pack. It keeps longer, stays fresh longer and retains the natural taste for a greater [fol 287] length of time, and is a deter-ent to infestation.

Judge Stephens: Is that what you call the Seedless Nectar, in one of those packages?

A. Yes.

Judge Stephens: Is that generally accepted as a marketable product?

A. It is; but it is supposed to be confined and is an exclusive pack of Sun Maid.

By Mr. Walton:

Q. And I understood you to say two additional things are done to that package?

A. To the Nectar.

Q. Yes.

Mr. Walton: We offer the box, the container, in evidence as Defendants' Exhibit next in order.

Q. Mr. Hines, in the sample that is here, and which has

been examined and about which you have testified, you have shown certain quantities of stems and sand and so forth. Now, taking a batch of raisins of that size, do those quantities run true?

A. Approximately true.

Q. Will you state the percentage of this material that is removed?

A. Cap stems, dirt and stems represent up to about 6 per cent of the total weight. Midgets will grade out anywhere from 7 to 10 per cent over the standard 19/64 screen that is used at present. The bulk will run around 47 per cent, and possibly 40 per cent for the Fancy grade. They, of course, vary with individual lots, but that is about our experience with this year's crop.

Judge Stephens: Are those grades standard or confined [fol. 288] to you?

A. These grades are standard by the Dried Fruit Association.

Judge Beaumont: I believe you have offered this box?

Mr. Walton: Yes, we have offered it in evidence.

Judge Beaumont: It may be received and marked Defendants' Exhibit B.

Mr. Walton: If the court please, we next offer for identification a sample of Muscats similar to the one just introduced in evidence, and ask Mr. Hines to briefly explain that to the court.

A. This exhibit here is arranged in about the same fashion as the one for the Seedless raisins.

Judge Beaumont: Mr. Hines, wouldn't that be the same? That would be illustrative of the same matters, except that in so far as Muscats are concerned there are the two additional processes that you referred to?

A. Exactly, and an additional grade in the graded raisins here, the procedure is just about the same.

Judge Yankwich: Won't you identify the compartments?

A. The first compartment is the unstemmed natural Muscats. The next is "Muscat waste sand", then "Muscat waste caps", and "Muscat waste stems". The next is "Muscat waste seeds". The next is "Muscat 4 Crown"—

Judge Yankwich: What is that?

A. That is the large size of the Muscat raisin. The next is "Muscat 3 Crown", then "Muscat 2 Crown", and "Muscat 1 Crown".

Judge Yankwich: Those grades have reference to size?

A. Yes.

[fol. 289] Judge Yankwich: Or quality?

A. Size. Then next you have a carton of old style seeded Muscats, and next is "Puffed Seeded Muscats".

Judge Stephens: Will you describe what "Puffed" means?

A. Puffed is a trade name that is used for the fancy grade of Muscat raisins which have been given a special heating and cooling oil treatment.

Judge Yankwich: Does it have the same effect on raisins that it has on rice and those other products they sell us, puffed wheat and puffed rice?

A. It doesn't puff it as much.

By Mr. Walton:

Q. In the designation there you are reading from right to left of the exhibit?

A. I was reading from right to left.

Judge Yankwich: Those compartments are identified by the labels, so there ought to be no difficulty in reading that into the record.

Judge Beaumont: Do you desire to offer this for the same purpose?

Mr. Walton: Yes, we offer that. And it has been suggested that these exhibits should be photographed.

Judge Beaumont: You may do that, if you desire. Let it be received in evidence and marked Defendants' Exhibit C.

By Mr. Walton:

Q. Mr. Hines, with reference to what has been called Muscat layers, what do you mean by Muscat layers, and how do they differ from the other Muscat raisins that you have testified about?

A. Muscat layers—the description of that indicates an unstemmed delivery of Muscat raisins which are received and packed in unstemmed form, in clusters.

[fol. 290] Q. Will you state what, in the ordinary routine, is done with those raisins from the time they are received until they are out of the hands of the handler?

A. Layers are received and graded. The inspection is

by eye by trained inspectors. They are received and then, when ready to pack, they are placed in a steam room for the purpose of softening up the stems, which is necessary in order to pack them without the grapes or the raisins becoming detached from the cluster stems. In most cases it is necessary to treat them with a blower, a blast of air, in order to blow off the loose dirt, and the like of that, that gets on them in the vineyards. After they are packed they are fumigated in order to eliminate or kill any infestation or bugs of that sort.

Judge Stephens: Is there a fumigation of the other raisins you have told us about?

A. They are fumigated, except in case of the Nectars and Puffs, and the heat treatment they receive there——

Judge Stephens: I mean the Thompson?

A. The Thompson; yes, sir.

Judge Stephens: They are fumigated?

A. Yes, sir.

Judge Stephens: In all cases?

A. In the case of 25-pound bulk raisins, they are fumigated in the flow line as they are packed into the 25-pound boxes. In the case of consumers' packages, they are put into a chamber or a car and fumigated after having been packed.

Judge Yankwich: The box, too?

A. The box, too.

[fol. 291] Judge Yankwich: I understand they have got it down to a science now so that they can put a bug in the middle of a carload and show that the bug has been killed by the fumigation?

A. That is correct.

Judge Stephens: Is that a chemical or gas?

A. There are different agencies used. In the chamber fumigation they use ethylene oxide—usually they use ethylene oxide. Then there is another one; it is the one that is in universal use at the moment. The name of it has just slipped my mind.

Judge Stephens: The fumigation is quite important, is it not?

A. Yes. In the case of fumigating in the flow line they use ethyl formate.

Judge Stephens: Raisins do not go on the foreign market unless they go through this process?

A. That is correct. The agency that is used mostly now, in the case of bulk cases, is ethyl bromide. That is the one I had forgotten.

Cross-examination:

[fol. 292] Q. You have the most thoroughly equipped plant and machinery equipment anywhere in the country, haven't you?

A. We do, yes.

Q. Yes. Now, many of these things that you do in your plant are not done in the ordinary packing plant, are they?

A. There are many of the individual operations that we do that are not duplicated in other plants.

Q. Yes. For instance, for the sugar test, most of them do that sugar test by eye, don't they?

A. It depends on the method of receiving. Under the adopted method of receiving the crop in the case of Sun Maid, that is handled similar to that on the chart.

Q. There isn't any other plant that has this equipment that puts the raisin through anything like the different processes that you do, is there?

A. Yes; there are two plants. The larger plant follows this general idea, but with a different type of equipment, possibly, in some respects.

Q. None of the smaller plants attempt anything of that sort, do they?

A. The smaller plants, I believe, now have as good stem equipment as we do, or any of the larger packers.

Q. But the stemming is one of the few processes. Outside of that they do not have these automatic weighing machines?

A. They do not have the automatic weighing machines, but they have the other equipment that is shown there, or equipment that performs that function.

Q. Are you familiar with Mr. Brown's plant?

A. No.

[fol. 293] Q. Do you know what he has in his plant?

A. I do not know.

Q. Are you familiar with Mr. Enoch's plant?

A. No.

Q. Does Mr. Enoch have equipment similar to that?

A. Mr. Enoch has stemming, he has his grading, he has his air separation. It may be in a different form there, but they perform that same function to raisins.

Q. As to those three things, but they don't have the automatic weighing?

A. No packer, other than Sun Maid has the automatic packaging equipment.

Q. Aren't there several matters, which you have indicated in your survey here, that are not found in any other plant except your own?

A. Other than the automatic packaging equipment, all the equipment you see on there is found in the majority of the plants.

Q. But many of the plants have much less equipment than that and still operate in interstate commerce and sell their raisins in competition with you, do they not?

Mr. Bowers: I object to that as calling for a conclusion. There is a lack of foundation here as to operating in interstate commerce.

Mr. Aynesworth: You have already stipulated that 95 per cent goes in interstate commerce. This is cross-examination.

Mr. Bowers: We haven't stipulate that these packers are in interstate commerce. It is assuming facts not in evidence. [fol. 294] Mr. Aynesworth: I assume the court will take judicial notice that the packers are engaged in that.

Judge Beaumont: Read the question.

(Question read by reporter.)

Judge Beaumont: What is the objection?

Mr. Bowers: The objection is that it is assuming a fact not in evidence. The witness has testified as to the operation of the plant here, not any operation in interstate commerce.

Mr. Aynesworth: He testified he is sales manager for the Sun Maid.

Judge Stephens: What was that, as to the amount of raisins that go in interstate commerce?

Mr. Aynesworth: 90 to 95 per cent of all raisins go in interstate commerce. That is the stipulation.

Judge Beaumont: Objection overruled. You may answer.

A. In so far as I know, of course, the raisins we pack are marketed in competition with these other packers.

Judge Stephens: Mr. Aynesworth, the witness has said the same function is performed. That is the important thing; rather than the machinery that does it. Do you

contend that a raisin can properly be produced for the market with any of these functions left out?

Mr. Aynesworth: I will state this, and I believe this is correct; that they are marketing raisins all the time, that go into interstate commerce, without using anywhere near all the elements that the witness has testified to.

Judge Stephens: It might all be done by hand, but the function would still be there. In other words, they do have to be graded and washed——

[fol. 295] Mr. Aynesworth: And stemmed.

Judge Stephens: And stemmed.

Mr. Aynesworth: And packed.

Judge Stephens: The sand has to be sifted away from them; they have to go through the fumigator, and so forth.

Mr. Aynesworth: As I see it, that is the complete process. He has described a superior process here. I simply want to bring out the fact that the ordinary function, in the ordinary workings, is much simpler.

Judge Stephens: But what is interesting to us is the process or the function, rather than the type of machinery that is used.

By Mr. Aynesworth:

Q. Now, you are the only one that sells the Nectar raisins?

A. We are the only one that sells the Nectar raisin.

Q. Do you have brokers in the East that sell for you?

A. We do.

Q. You have brokers in all the principal markets?

A. We do.

Q. And you get your raisins from the local growers for the purpose of filling the orders which are obtained by these brokers in the other sections; is that right?

A. Yes, sir.

Q. And when you procure raisins from a grower you do that with the thought of disposing of those raisins through your brokers in other cities and places?

A. We do.

Q. You make your contracts with the growers for the purpose of enabling you to make firm commitments through your brokers to the buyers, do you not?

[fol. 296] A. We do. We have the fruit before we fill the sales.

Q. And the object of getting the fruit is to enable you to carry on this extensive commerce through your brokers?

A. Our object is to fill the orders that they sell; yes, sir.

Q. And if you were not able to make your contracts for purchase or acquisition from the growers you would be unable to carry on this extensive business, wouldn't you?

A. In our particular contracts we are covered on this at the start. We always feel covered.

Q. I don't understand your answer.

A. When we sell raisins we have them before we confirm the sale. Our brokers then sell them. They take the order and submit it to us for our confirmation. If we have the stock and it is agreeable to us, we confirm the order.

Q. Then your purchase or your acquisition of raisins from the grower is for the purpose of being able to approve and confirm orders sent in by your various brokers? How many brokers do you have throughout the United States?

A. I should judge more than a hundred.

Q. And in foreign countries?

A. We have one at the present.

Q. Well, when it isn't during a war how many do you have in foreign countries?

A. A maximum of four.

Q. A maximum of four. You sell in all countries, do you not?

A. Practically so.

Q. Through this system of brokers?

A. In London we have our own company.

[fol. 297] Q. In London you have your own company?

A. It handles England and Continental Europe and the Scandinavian countries.

Q. Does it in turn operate through brokers?

A. In some instances.

Q. Then you regard your contracts with your growers as a necessary part of your business in order to carry on this wide and extensive sale of raisins; is that right?

A. Yes.

Redirect examination.

By Mr. Walton:

Q. I would like to ask a little more about the storage of raisins in the condition that they are received. We will

call it the natural dried condition, before anything is done to them. Will you tell us a little more about the practice in the industry with respect to whether or not the processers ordinarily have on hand at all times unprocessed raisins, natural dried raisins, that they haven't done anything to?

A. They usually do have, yes.

Q. Now, I will ask you this; I am referring now to the raisins that have been exhibited here, as they are hauled in by trucks or other conveyances and before anything has been done to the natural sun dried raisins, outside of the sales from producers to the persons who maintain these plants, and outside of occasional sales between these persons owning these plants, are there any mercantile transactions in raisins in that state?

A. Not to my knowledge.

Q. Do you know of their being used, bartered or sold as a commodity at all in that condition, except in those two [fol. 298] instances?

A. I do not.

Q. Does your firm take those raisins, and without doing anything to them simply put them in containers and ship them anywhere?

A. Never.

Q. Do you know of their being on sale in any mercantile establishments anywhere?

A. I do not.

Q. Is it your testimony that the commodity in that condition is not sold, except as the object of the two transactions I have stated?

A. Definitely.

Q. Mr. Bowers has suggested a couple of questions I might ask. There has been some statement here regarding the larger and smaller packers. I believe it is in evidence yes, it is stipulated that, including the Sun Maid, there are approximately 40 packers. Could you give the court generally the average division of the business between those packers? In other words, take about the five largest, what percentage, ordinarily, of the raisin business do they handle?

A. Oh, the five largest ones would handle possibly 75 per cent of the crop.

Q. Probably 75 per cent of the crop?

A. That would be my estimate of the five.

Q. That would be your estimate over a period of years?

A. That is correct.

Q. Could you tell the court about the percentage that is handled by the ten largest?

[fol. 299] A. I should think that would run to a maximum, on an average, of about 85 per cent of the crop.

Q. About 85 per cent. That leaves about 30 processers who handle the remainder or 15 per cent?

A. That is the way we figure it, about.

Mr. Walton: That is all.

Recross-examination.

By Mr. Aynesworth:

Q. You do not mean to say that you do not make sales of anything except clean and prepared raisins, do you?

A. To the trade?

Q. Yes.

A. We do not.

Q. Don't you take orders often times, and have many orders for the sale of raisins that are still out in the sheds, uncleaned and unprepared?

A. In that form, no, sir.

Q. In other words, you never sell raisins unless you have got them in the carton?

Mr. Walton: Or prepared for the market.

By Mr. Aynesworth:

Q. You don't take future orders then, at all? You never take an order for raisins when you haven't got them actually stemmed and cleaned and packed in packages?

A. We do.

Q. Then your statement awhile ago that they are not commercially salable until they are actually cleaned and capped and boxed, and so forth; you did not mean that, did you?

[fol. 300] A. I intended to say that they are not fit for commercial use until they have been stemmed and cleaned.

Q. But many of your sales are made and, in fact, nearly all the sales are made before you do that; and on the basis of getting the sale or the contract you put them through

machines and get them in shape and send them out in response to the orders placed with the brokers; is that the case?

A. We sell against our raw stock quite often.

Q. Yes.

Judge Stephens: But they are never sold to be delivered in that form?

A. No, sir.

Redirect examination.

By Mr. Walton:

Q. Mr. Aynesworth suggested or stated, and you have stated that sometimes you take orders to deliver raisins which at the time have not been processed; is that correct?

A. That is correct, to this extent: that we take orders for packs that have to be processed, that we later make from the raw stock that we have in storage at the time the sale was made.

Q. But you don't take any orders to sell what you call raw stock?

A. Never.

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Mesrob Mirigian, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: Will you please state your full name?

The Witness: Mesrob Mirigian.

[fol. 301] Direct examination.

By Mr. Walton:

Q. Mr. Mirigian, where do you live?

A. Fowler.

Q. Are you in any way connected with the production of raisins?

A. Yes.

Q. In what connection? In what capacity?

A. Operating 50 acres.

Q. 50 acres of raisin vineyard?

A. Yes. It isn't all in vineyard. Approximately 35 acres of raisin varieties.

Q. Raisin varieties, and which are they?

A. Muscats and Thompsons.

Q. How long have you owned and operated this property?

A. Well, I have lived on that particular one since 1917, and operated it actively, where I have had control of it, since 1927.

Q. How long have you lived in Fresno County?

A. Since 1900.

Q. And between 1900 and 1927 did you live on raisin producing property?

A. Yes, I lived 17 years in Selma; from 1900 until 1917.

Q. Was that owned by members of your family?

A. My father.

Q. Is it a fact that you assisted in the work on this property?

A. Well, at that ranch at Selma, it was after school when I was able to work. That was my childhood days.

Q. Mr. Mirigian, what connection, if any, have you with [fol. 302] the Raisin Proration Zone No. 1?

A. I am a member of the program committee from District 3.

Q. How long have you been a member of such program committee?

A. I believe it was last August, 1940.

Q. Coming back to the period, Mr. Mirigian, when you acquired your own property and began producing and selling raisins, I would like to ask you what conditions prevailed at that time, in the industry, with respect to grading raisins that were offered by the producers to the packers?

A. You mean grading raisins as they were delivered to the packing house?

Q. Yes.

A. Well, there was no set standard. The grading was done by the individual packer that bought these raisins.

Q. From the growers' viewpoint was that advantageous or disadvantageous?

A. Well, it would be on individual instances. I would say generally it was a disadvantage to the grower.

Q. For what reason?

A. Well, conditions would sometimes justify, where they buy at a higher price, and if the market should happen to be down they would grade it much heavier and cut down on your price.

Q. It is in evidence that the 1940 program has, in effect, grading provisions—uniform grading provisions. Does that present any advantage or is that, in your opinion, from a grower's viewpoint, a disadvantage?

A. Well, speaking as a whole, for the growers, I think [fol. 303] it is to their advantage.

Q. In what respect?

A. It would be a uniform grading, where one particular grade would apply to all alike.

Q. It is in evidence, Mr. Mirigian, that under the 1940 Raisin Program sub-standard and inferior raisins were removed from normal trade channels. Prior to this program was that the fact and condition in the raisin industry?

A. No, it wasn't.

Q. From the growers' viewpoint and the viewpoint of the industry generally do you consider that the diversion of the sub-standard and inferior raisins is advantageous, or not?

A. Well, speaking as a grower I think it is.

Q. State, please, why you make that statement?

A. Well, where a uniform grade exists and a certain type of raisin is unfit for the regular normal raisin trade channels, it would be eliminated off the market. Extra advantages are more disposal of raisins to the consumer, it would be greater, and that in turn would affect favorably towards growers, with more consumption of raisins. In the past—I know this definitely—that some raisins have been sold that really were not fit for human consumption, and they would not come back for any repeat orders when that type of raisin is put on the market.

Cross-examination:

Q. What do you term the sub-standard raisin?

A. The way I understand the sub-standard raisin is that it is a raisin below the standards set by the D. F. A., and which are below a certain sugar content by weight.

Q. It is still an edible article, is it not?

[fol. 304] A. If it is properly processed, you mean?

Q. If it is properly taken care of it is still an edible article, isn't it?

A. I don't think a sub-standard raisin is as edible as a standard raisin.

Q. That is true, but as an article it is still edible for food, isn't it?

A. I don't think it would kill anyone who ate it.

Q. In other words, it hasn't the same saleable quality as the other one, but it is still a marketable article?

A. I wouldn't say that.

Q. It has been sold in the past, hasn't it?

A. Yes, it has.

Q. It has gone through the market for 50 years, in the raisin industry, hasn't it?

A. Yes.

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E. L. CHADDOCK, called as a witness on behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: E. L. Chaddock.

Direct examination.

By Mr. Aynesworth:

Q. What is your present business, Mr. Chaddock?

A. I am a raisin broker selling for about eight of the packers throughout the United States and Canada—throughout the world, the United States and Canada.

Q. When you say eight packers, you mean local raisin [fol. 305] packers?

A. Local raisin packers.

Q. How long have you been connected with the raisin industry?

A. I started in with the Eagle Packing Company in 1889, as a small boy, grinding raisins out with a hand stemmer

Q. Would you state briefly to the court what your contact has since been with the raisin industry?

A. I started in with the Eagle Packing Company in 1889, my occupation being grinding away on a hand stemmer, in which the process is not very different from what it is today. And about a year later my father started in the raisin business and he didn't hardly know a raisin from a prune, and I did. I had had one year's experience, so I was quite helpful to him. Then in 1893 or 1894 I was appointed, as a young boy 19 years old, as manager of our Fowler plant, which afterwards became our big plant and

seeding plant, and which I managed for probably forty years.

Q. How many plants did you and your father operate?

A. In the nineties we operated about seven, scattered throughout the Valley.

Q. Have you been intimate with the industry at all times since your entry into it?

A. Yes, continuously.

Q. You have been informed and acquainted with the method of handling and preparing raisins for market and the marketing price, and so forth, from that time on?

A. Yes.

Q. With respect to the processing or preparing raisins for market, whichever it is, will you explain just what has [fol. 306] taken place over these years?

A. Well, perhaps it would save the court's time if I would describe, as nearly as I can, the processing in the early days, or the packing of raisins in the early days, and how it has changed down to the present time.

Q. All right.

Mr. Bowers: If the court please, I don't see the materiality of the processing of raisins ten or twenty or thirty years ago, to the case here. We are concerned with the present conditions and present functions; not with the development of it.

Mr. Aynesworth: I think this will be rather material, because there was some testimony given yesterday that the raisin is not commercially marketable or usable except after it goes through a very extensive process. I think I will show, by one who is one of the oldest in the industry in Fresno today, that it is a marketable product by a much simpler method, a very marketable and salable product.

Judge Beaumont: You may proceed.

A. The process of stemming raisins was simply to dump them into a hopper; they went through a rapidly revolving cylinder against a concave, a wire which knocked off the stems. Then they were graded, in those days, the Muscats into four grades, as described yesterday by Mr. Hines, and they went immediately into the box, which was nailed up, and loaded onto cars. That was the entire process.

By Mr. Aynesworth:

Q. At that time was there any cleaning or washing or

anything of that sort?

A. No, there wasn't.

Q. Was there any sugar test or anything of that sort?

[fol. 307] A. None.

Q. Was there any fumigating?

A. None.

Q. When was the first fumigating brought into the industry?

A. Well, I think, in a general way, it wasn't until possibly ten or twelve years ago. Possibly I am off a year or two or three, one way or the other, on that.

Q. Are you familiar with what is known as the dried pack of the American Seedless Raisin Company?

A. Yes.

Q. Just describe to the court that product.

A. I was very familiar with the American Seedless operation. We did their seeding for them for a great many years. I have been in their plant a great many times; and their process was to simply dump the raisins into the hoppers I have described; they went through the stemmer and the cone and cap stemmer, and then went directly into the 25 pound boxes; or in case they were put in cartons they were simply put in the cartons by hand—dumped in by hand, without any processing whatever or any washing or any cleaning, except what the cap stemmer did, which was supposed to knock off the sand or any dirt on a properly cured raisin, on a standard raisin, and they went into the carton ungraded, ungraded as to size, where today we have them graded in Fancy, Choice, and Midget Thompson; but in those days they were ungraded.

Q. Did they compete with the Sun Maid and Rosenberg and the others on favorable market conditions?

A. It usually brought from an eighth to a quarter of a [fol. 308] cent premium over Rosenberg, and I am inclined to think it brought a premium, sometimes, over Sun Maid. It was a very popular brand; in fact, the most popular brand at that time on the market. In fact, Mr. Nutting was the one that put the Thompson Seedless on the market throughout the country, and it was the most popular brand there was on the market.

By Mr. Aynesworth:

Q. Mr. Chaddock, with respect to the merits of the rais-

ins that have gone through this very minute detail or preparation and the raisins sent out in the dry pack, which has the superior quality?

A. I would say the dry pack.

By Mr. Aynesworth:

Q. Why is that?

A. It keeps better. A standard raisin, which is properly cured needs no processing whatever, in the true sense of processing. And when you wash a raisin, or any process that is put into a raisin, that has a deteriorating effect on that raisin, rather than a beneficial effect, for this reason: A raisin has a natural protective covering—now, this is somewhat technical—it has a natural protective coating called the bloom on the raisins; I imagine sort of an oil protective coating, a natural raisin oil, which protects the raisin and closes the pores. When you wash that bloom off and wash that protective coating off with water you have opened up the pores of the raisin, allowing the oxygen to get into the interior of it, and inside of 30 to 60 days that raisin begins to deteriorate. Many times if they use a little too much water it causes a crystallization of the raisin, which is very objectionable to the consumer and to the trade. And fre- [fol. 309] quently a raisin which has been washed is apt to ferment; sometimes they will sour; but the keeping quality is very much reduced. A natural raisin on the stem will keep, if it is properly cured, from two to three years; and sometimes it is very difficult to tell an old crop of raisins from a new crop of raisins; but where you wash them it reduces that keeping quality.

Q. Why do they not, for instance, at Rosenberg's and Sun Maid and other places, pack up great quantities of raisins, using the method you heard here yesterday, and keep them in storage?

A. They found out by very bitter experience that if they did that those raisins, inside of 30 days, had a very rusty look. In the case of Muscats, you knock off the stem of the Muscat and it allows the air to get inside the raisin, and inside of a few months, sometimes inside of 30 days, that raisin begins to crystallize and look like an old raisin one or two years old.

Q. Are you familiar with the method used by packers like Mr. Brown in processing their raisins for market?

A. I have been in nearly every plant in the valley. I think I know the process that is used by all of them.

Q. Would you mind describing very briefly that used by packers like Mr. Brown?

A. I have been in Mr. Brown's plant. All he does is take the raisins off the wagon, put them onto a four-wheeled truck, wheel them over to the hopper of the stemmer, they whiz through the stemmer and cap stemmer, of which one of them is a cylinder, a rapidly revolving cylinder against a concave that sets about an inch from the cylinder, which knocks off the stems. There is a fan that blows the stems [fol. 310] out; then they go into the second recleaner or rotating cylinder and that knocks off the little bit of a cap stem, which in some cases is left on; then they go directly into a 25-pound box, which is nailed up if it is a wooden case, or in a fibre case which is glued and immediately trucked over into the cars. That is the operation.

Q. Does he put them through a grading process?

A. Yes. Sometimes he grades them and sometimes he doesn't. It is according to how his orders come in. Frequently they are ordered out ungraded. Sometimes they are ordered graded.

Q. Do you know whether or not the quality of raisins produced by him at his plant is a good standard commercial product?

A. We have sold many raisins for Mr. Brown and we have been complimented. I had a letter the other day commenting one of his shipments. They said it was as fine a car as they ever received.

Mr. Aynesworth: Have you personally seen products that have come out of his place?

A. I have seen many cars.

Q. And are they all good, standard quality?

A. They are all good, standard quality, as far as I know.

Q. When you say "as far as you know"——

A. What I saw were standard quality.

Q. What about the practice throughout the history of the raisin industry with respect to the buying of raisins by the packers? When do they do their buying?

A. Well, usually they begin as soon as the frost danger [fol. 311] is over.

Q. When is that?

A. Well, the last killing frost we ever had was the 2nd of May, back in the nineties; a very killing frost.

Q. When is the usual last frost?

A. Usually the last, about the 20th of April.

Q. They begin to buy at that time?

A. The eastern buyers begin soliciting, but some of the packers, through their brokerage system, solicit orders from the buyers in a similar way, and if they sell a car of raisins, they, in turn, make a contract with the growers to cover that sale. That is a common practice. Sometimes a packer will buy short and sometimes he will buy long, according to the trend of the market, whether he thinks it is going to be up or down. But the general practice is, at least with the medium sized packers, to buy and sell contracts, contracting the eastern buyer and the grower for fall delivery.

Q. Do the little packers carry on their business that way?

A. Yes.

Q. Do the packers, generally speaking, have brokers and agents throughout the states?

A. They all have.

Q. And do you yourself do business through eastern brokers?

A. Yes.

Q. Mr. Chaddock, you are familiar with the matter of handling layer Muscats, are you?

A. Yes.

[fol. 312] Q. Just how are they handled?

A. They are brought in from the farmer usually today; he has what is known as trays. The grower dumps three or four trays into a box, then lays a sheet of paper in there and dumps three or four more trays in until the box is full. Those raisins are supposed to stand in the field and equalize as to their moisture content. Some bunches will have some under-cured berries and some over-cured berries on the bunch; and the proper method of the grower—it is if he is a careful grower—is to let those raisins stand for some weeks so that the moisture of the big berries will absorb into the dry berries and into the stem, so as to make the stem pliable so it can be handled. If this is not done the stems are very brittle, and you almost look at them cross-eyed and they will fall off the stem.

Q. When they get into the hands of the packer how does he handle them?

A. He simply places that sweatbox before a 20-pound box and lifts the raisins out of the sweatbox and places them into the 20-pound box..

Q. Do they ever steam them or do anything to make the stems less brittle?

A. Yes, they do; if the raisin is not properly cured they do. They are sometimes forced to do that by improper curing or improper sweating of the raisin by the grower. If the grower holds his raisins back until they are properly cured, they are not steamed, or no process whatever. If the grower rushes his raisins into the packing house the stems are apt to be brittle; there will be berries on there that are too dry; and the custom of the packer is to not put them in the steam house unless he is rushed to get them out. Sometimes if you have got an order going out tomorrow you can't let [fol. 313] those raisins set there two or three weeks to equalize and so you are forced, sometimes, to put them into a steam house and to moisten up the stems where they can be handled without breaking; but that is merely to speed up the operation. It has nothing to do with the preparation of the raisin.

Q. Yesterday the witness was telling us it only took eight minutes from the time they begin this elaborate handling of the raisin until the large box was put out, and ten minutes for the smaller carton.

In the ordinary small plant, where they do not use that system, from the time they start on a box of raisins, how long will it be before it is in the larger box or the carton?

A. From the time it goes into the hopper, dumped into the hopper of the stemmer, it is in the 25-pound box, I would say, in half a minute or a minute.

Q. And the carton?

A. In the carton—they are taken from the stemmer and placed before the women and they are filled, in most of the plants, by hand. I think the Sun Maid has a more elaborate process. They have a lot of automatic machinery that is not commonly used by the other packers.

Q. When a packer like Mr. Brown gets his raisins from the grower and has an order for them, how much time would they stop at his packing plant before they could be in the box or in the carton and on their way to the market?

A. In his particular plant he is not on the railroad, so he would have to arrange for a truck to call for the raisins.
[fol. 314] Q. Well, assuming a truck was there?

A. Assuming that the truck was there and the load of raisins was there from the grower, they would go immediately from the wagon into the hopper, through the stemmer into the box and into the truck. I don't imagine it would take over 5 or 6 minutes.

Q. Of course, Mr. Chaddock, if it was a large shipment it would take a greater length of time to get it out?

A. Yes.

Q. It would depend on the size of the order, as to the time it would take to run it through?

A. I was referring to the individual case that would go onto the truck at that time.

Q. That statement would be true relative to the one sweatbox?

A. Yes.

Q. But it would depend upon the amount of raisins to be handled and to be prepared and to be taken care of?

A. Yes.

Mr. Aynesworth: Take the witness.

Cross-examination.

By Mr. Walton:

Q. Mr. Chaddock, in that case that has just been discussed, I would like to ask you to give us a little more information about that. As I understand your testimony it is that under certain conditions, if the incoming raisins are in immediate demand in response to an order, it is desirable and the practice is to take them in the receiving door, process them, and immediately load them out; is that correct?

[fol. 315] A. Yes.

Q. Isn't it a fact, Mr. Chaddock, that that is, you might say, an ideal condition, but very often doesn't prevail?

A. That is true.

Q. In other words, the packer, in the interest of economy, likes to do that; that is correct?

A. Yes.

Q. But isn't it also true that they are controlled by two factors? The orders that they have to fill and the delivery to them of the raisins are more or less beyond their control; is that correct?

A. That is correct.

Q. We will take, for example, a packer who goes out along in the spring or summer and takes orders to sell and deliver these raisins beginning about October and, say, to December. He has those orders and he, as far as he can, gets his growers' deliveries to synchronize with those; is that correct?

A. That is correct.

Q. Isn't it a fact, however, that at the peak of the marketing season that is entirely impossible?

A. Yes.

Q. Isn't it a fact that a good many more raisins come in—and this is universal—than he can pack out, at certain periods?

A. Yes.

Q. Isn't it a further fact that, getting most of his raisins in the month of October, November and December, and desiring to sell raisins for twelve months, in addition to the fact that he can't synchronize the orders in the fall, [fol. 316] he has to, if he is going to stay in business, put a supply in storage?

A. That is correct.

Q. And so in the case of the ordinary run of packers, there are always a considerable quantity of raisins in storage; is that right?

A. Yes.

Q. Even at the height of his packing house season, and that is because he can't keep up with what is coming in; that is one reason; is that right?

A. Yes.

Q. And the other reason is that he buys and stores them to fill orders during the time the growers aren't delivering; is that right?

A. That is correct.

Q. Of course, these inventories vary, but the storage represents a large percentage of the raisins, ordinarily, doesn't it?

A. Well, with any individual packer, it depends on the size of the packer, I think. The big packer, of course, can store big quantities of raisins. He has the money to do it with. The small packer, with less finances, has to operate his business more or less on a merchandise basis, having the raisins delivered today and shipping them out tomorrow. Otherwise, his bank account is apt to get involved,

unless he does that. It depends largely on the size of the packer; the financial situation of the packer. Some packers store them in big quantities.

Q. That undoubtedly would be true, but it would be unusual to find a packer without raisins in storage if he was [fol. 317] actively in the business, wouldn't it?

A. He would have some raisins, as a rule, except I would qualify that, that during the period from May until October frequently the packers, especially the smaller packers, are often without raisins.

Q. For a short time they are without raisins?

A. For several months they are apt to be; some years worse than others, of course.

Q. But the point is that during the time they are operating they always have raisins in storage?

A. During the rush season they nearly always have some raisins. I wouldn't say that during September and October they store up much. The small packer doesn't; and I doubt if the big packers store many raisins in the early part of October.

Q. Then the raw goods that are in, awaiting future orders, or future shipments, are not processed until just before they are going to be shipped; is that correct?

A. They are not processed in what way, do you mean?

Q. I mean they are not stemmed or cleaned; they are kept in the sweatbox?

A. They are kept in the sweatbox.

Q. In other words, these raisins that a factory is going to receive in October, and say they are going to ship them two months later, they would not stem them and clean them and package them and keep them in that shape until they are ready to ship them; they keep them in the raw shape in the sweat box and stem them and prepare them and clean them and put them in packages immediately before shipment?

A. Yes.

[fol. 318] Q. That is the custom?

A. Yes.

Q. Mr. Chaddock, I don't care particularly about this, and if you don't care to state it is all right; but do you mind stating the ones for which you act as broker? If you prefer not to answer, I don't care.

A. It is no secret at all. Do you want their names?

Q. Yes. It isn't important, if it is something you would rather not state.

A. I have no objection to it at all.

Q. Will you state them?

A. I can perhaps name most of them from memory. I sell raisins for Mr. Brown, the Empire Packing Company, the Del Rey Packing Company, Peloian Packing Company, the El Mar Packing Company, the California Raisin Company, of which my son is sales manager; the Central Valley Raisin Company, the Selma——

Q. You don't represent any of the four or five known as the larger packers?

A. No; we do no business with them at all.

Q. They have their own agencies?

A. They have their own brokers.

Q. And this dry pack, the American Seedless dry pack is a very distinctive and important factor in the industry, isn't it?

A. It was.

Q. Was that a patented process that nobody else could use, this American Seedless dry pack?

A. No; it was the common way of putting up Thompson seedless raisin for years and years.

[fol. 319] Judge Stephens: Pardon the interruption, but it seems to me that what we must get at are the actualities; not why.

A. Well, I was going to show, if your Honor please, the reason it was necessary to use water on a raisin.

Judge Stephens: Well, it still is, isn't it?

A. Under the change in the system of packing with the new Philadelphia recleaner, they had a tendency to gum up, and you can't operate the Philadelphia cleaner today without the use of water. That is the primary reason for using water. It isn't to wash the raisin. A properly cured raisin, a standard raisin needs no washing. It has been used for years and years without washing.

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William N. Keeler, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name?

The Witness: William N. Keeler.

Direct examination.

By Mr. Bowers:

Q. Mr. Keeler, will you state what connection, if any, you have with the raisin industry and what the extent of it has been?

A. Since July, 1923, I have been connected with the Sun Maid organization; that is, the Sun Maid Raisin Growers Association, and since May, 1931, have been the general manager.

Q. As such have you been in constant touch with the situation in the raisin industry?

A. Yes.

Q. In all of its functions?

[fol. 320] A. Yes; I can say that I have.

Q. Were you familiar with the method of handling the raisins, the transactions between the growers and packers, prior to the institution of a raisin program under the Agricultural Prorate Act?

A. Yes, I am.

By Mr. Bowers:

Q. Mr. Keeler, can you state what is the customary method of the sale and purchase, and the time season, between the grower and the packer?

A. Yes, I can. The packers, over a period of several months—the delivery period—purchase normally most of their requirements, and by "requirements" I mean the tonnage that they will require to fill their sales during the forthcoming year. These growers, in the aggregate, sell and dispose of, during the months of August, September, October and November, the quantity of raisins that the packers, in turn, sell over a period of a year or more.

Q. At that time was there any universal system of grading of the raisins as they came in, in the raw product, from the growers, or did each packer use his own discretion?

A. Well, since I have been familiar with the industry the Dried Fruit Association maintained—the packers have purchased, under what is known as the Dried Fruit Association purchase contracts. That provides a definite description of the raisins to be purchased. At any time that the grower believes that the grading is unfair he has a right to arbitrate that finding.

Q. And that was done individually by each packer as he purchased raisins?

A. It was done in connection with the purchases of each [fol. 321] of the individual packers, yes.

Q. Are you familiar with the grading requirements under the present program, the 1940 seasonal program?

A. Yes, I am.

Q. To what extent is there a difference, if any between the two systems?

A. I would say roughly they are the same. As a matter of fact, I know that the grade adopted and approved, as adopted under the prorate program and approved by the Commodity Credit Corporation in connection with their loans, were the result of a very careful study made by representatives of the F. S. C. C. and Commodity Credit Corporation; and the grading actually done in the industry, prior to putting the program into effect, I would say the net results were very much the same.

Q. Have they both resulted in the elimination of the same character of raisins from the market?

A. I think we will have to draw a difference there. I was thinking of the grading. As a matter of fact, before, separate and apart from any program, there was no inhibition on any packers from receiving raisins of low grade or off grade raisins, paying for them whatever price was arrived at between themselves and the grower. Under the program, of course, there is a definite program against receiving off grade raisins. There is that difference. It isn't a difference in the grading so much as a difference in the result of the grading, as far as the use or availability of that particular fruit.

Q. That grading is entirely distinct and separate, is it, from the trade grading of the choice and fancy raisins, and [fol. 322] so forth?

A. Yes, it is.

Q. There is no connection at all between the two?

A. No.

Q. Referring to the carry-over that was on hand as of September 1, 1940, of the 70,000 tons, was that carry-over in the form of the raw product as it came from the growers and which the packers had stored as received, or was it in the form of finished and packaged raisins?

A. It would be almost entirely in the form of sweatbox goods, that is, raisins stored in sweatboxes or packing boxes

as received from the grower. May I make a statement with respect to a previous answer which I made?

Q. Yes.

A. You asked if there is any difference between the grading set up under the program and the normal grading. I answered that roughly they are the same. There is this difference in form under the grading set up by the program: There is a moisture—a specific weight by gravity test, which our own organization has utilized for years, I think back as far as 1924 and 1925. That, in effect, is almost identical with what is known ordinarily as eye grading, but the specific provision was placed in this program, actually requiring this particular test. The result, I would say, of the two would be almost identical.

Q. Referring to the 1939 crop of raisins, were there at all times, prior to and up to September, 1940, an available supply, in the State of California, of that crop?

A. Yes. I would go further than that. I would say there was an over supply.

[fol. 323] Q. Would you say that the raisin program, either in 1938 or 1940, has at any time left an insufficient supply in the hands of packers to meet the market demands?

A. No, I would not. I would say that at all times, up to and including the present, there have always been raisins available to packers at a price that would allow them to meet competition, during the period that you mention.

Q. In other words, the problem of the industry has been a marketing problem, and not the supply of raisins?

A. It has been a——

Q. You have always had plenty of a supply, but you didn't have the market to absorb them?

A. It has been a distribution problem largely, yes.

Direct examination.

By Mr. Aten:

Q. Mr. Brown, you stated in your examination, and it is plead in the pleadings here, that a prorate enforcement is maintaining, or was and is maintaining watchers out around your property and your plant. Are they still doing so?

A. Yes.

Mr. Aten: I have one more question, and the reason I am

asking these questions is because yesterday some member of the court made the inquiry or the observation that they wanted to see if this is a continuing situation. We claim that it is, of course, and that it isn't at all a moot question, for the various reasons that Mr. Brown has stated.

Judge Beaumont: Well, proceed.

By Mr. Aten:

Q. You allege in your complaint, Mr. Brown, that the enforcing officers have threatened to enforce the penalties, provided by the act, against you, that is, $500 for each vio-
[fol. 324] lation; is that correct?

A. Yes.

Q. To what extent?

A. To the extent that they are maintaining two actions against me for $13,000?

Q. For violations of the act?

A. For violations.

Q. And have they threatened to bring other——

A. Yes. They saw our trucks and attempted to talk to the growers, trying to dissuade them from selling raisins to us.

Judge Beaumont: As far as the actions are concerned, Mr. Aten, you would know about that. Are those the actions that are based on the provision for fine?

Mr. Aten: Not a fine. There is a civil penalty of $500 for each violation, and the two actions allege violations of sufficient number to bring the total demand to $13,000.

Judge Beaumont: It is a civil action for penalties?

Mr. Aten: Yes. Those actions are pending in the State court.

Judge Beaumont: Very well.

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[fol. 325] From Reporter's Transcript of October 16, 1941

The above entitled matter came on for post trial hearing on settlement of findings in the United States District Court in and for the Southern District of California Northern Division before Honorable Albert Lee Stephens, Honorable Leon R. Yankwich, and Honorable Campbell E. Beaumont,

on the 16th day of October, 1941, commencing at the hour of 10 o'clock a. m.

Judge Beaumont: I think for the purpose of the record, it is well to state that before the reporter was called the matter of the possible re-opening of the case for further testimony was considered. Statements were made by Judge Stephens and Judge Yankwich. Mr. Bowers made a statement also regarding the matter, and it may be considered that his statement is in the nature of an objection to the opening of the case. That objection is overruled. The case will now be reopened for one purpose only, and that is for the purpose of receiving testimony regarding the character of shipments by Mr. Brown, as to whether or not these shipments were interstate. The defendants, of course, will be allowed to offer any testimony they desire to offer, if they so desire in refutation thereof. The purpose of this reopening is for enlightening the Court as to the one matter only. Now is there any further statement? Judge Stephens, any further statement you desire?

Judge Stephens: No. That covers it.

Judge Beaumont: Judge Yankwich?

Judge Yankwich: No.

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[fol. 326] Porter L. Brown (Plaintiff) called as a witness in his own behalf, and being first duly sworn, testified as follows:

Mr. Aten: Mr. Brown, on the trial of the action we introduced certain contracts which you had made in the spring of the year 1940 calling for delivery of 1940 crop raisins in the fall of that year. Amongst those contracts was one with the American Trading Company, two with the American Trading Company. Is that correct?

A. Yes, sir.

Mr. Aten: I believe the contracts all read "Subject to shipping order," do they not, Mr. Brown?

A. Yes, sir.

Mr. Aten:

Q. I might ask you, Mr. Brown, in taking these contracts

and in the conduct of business generally, are the shipping orders or the destination of raisins usually given in the pre-season contracts?

A. They aren't given in the pre-season contract.

Mr. Aten: This contract with the American Trading Company is Exhibit 1. This is time of shipment, October.

Q. Do you find anything on the contract itself showing the point of delivery of shipment?

A. No. There is nothing on the contract that indicates the point of shipment.

Q. Now did you on that contract and with the other contract that is in evidence with the same parties receive shipping orders?

A. We received shipping orders.

Q. And what were those orders? That is, what was the destination? Where were the goods to be shipped to?

Mr. Bowers: Just a moment. If there are any shipping orders on that, we object to any evidence. The shipping [fol. 327] orders are the best evidence.

Mr. Aten: Were those orders——.

Judge Stephens (Interrupting): What do you mean by shipping orders, Mr. Aten?

A. This contract calls for 10,000 cases of raisins. We would get shipping orders for——

Judge Stephens (Interrupting): In what way did you get those? Were they in some letter or something of that kind?

A. Yes, regular forms of shipping orders from this American Trading Company advising us to ship——

Judge Stephens (Interrupting): Do you have those letters?

A. No, I don't have them with me. I have them at home.

Judge Stephens: Do you object to him stating what they stated, Mr. Bowers? He says he has these letters at home.

Mr. Bowers: Well, if the Court please, here is my point: I haven't that contract before me, but here is a similar one, and the contract states, "F. O. B. cars Kerman, California." Now I don't think that——

Mr. Aten (Interrupting): That is merely a loading.

Judge Stephens: I suppose, Mr. Bowers, that if they

were trying to enforce that contract your objection would be good, but this is for a quite a different purpose. It is to show actually where they were to deliver them, whether to deliver them into interstate commerce or not. And I doubt very much if this would be binding the same way a suit on a contract would be binding.

Mr. Bowers: Well my point was as I say according to the contract here that these contracts provided here for the delivery.

Judge Stephens: Well it says, "F. O. B. Kerman, California."

Mr. Bowers: "F. O. B. cars at Kerman, California," yes. [fol. 328] I think now what the witness and what counsel are attempting to do is to establish that subsequently the buyer here asked for shipment to be made to different points. In other words that so far as his contract for the sale here, the contract itself calls for the delivery here, f. o. b., and then subsequently the buyer—there is no question about that, as far as that is concerned, that the ultimate buyers took a large portion of them outside of the state. But now my point here is that Mr. Brown was not—the plaintiff here was not selling them direct outside of the state. He was selling for delivery here. And then possibly following the directions as a—acting for the California Trading—or whoever the contract is here, the American Trading Company, to pack and load the cars for them in which they were selling the raisins to points outside of the state. I think that is just exactly what the testimony will develop is the truth.

Judge Stephens: Well I think we all understand the point you are developing. If my associates are in agreement, I would overrule that objection in order that we may get the facts. I would like to have that developed a little bit.

Judge Yankwich: I join.

Mr. Aten: What was the question, Mr. Reporter?

(Question read, as follows: "And what were those orders? That is, what was the destination? Where were the goods to be shipped to?")

A. The goods were to be shipped to Minnesota and Mississippi.

Q. Does that refer to both of the American Trading Company contracts or to the one?

A. It refers to this American Trading Company.

Q. American Trading Company. There was a second [fol. 329] American Trading Company contract. Did you receive shipping orders on this?

A. Yes, sir.

Q. And where were those goods to be shipped?

Mr. Bowers: Understood that is subject to the same objection?

Judge Stephens: Same objection, and same ruling.

A. They were to go to Chicago and New York.

Mr. Aten:

Q. There was a contract, Dried Fruit Distributors of California, Napa, and on this contract it says "Routing later. F. O. B. seller's plant, Kerman." Did you receive a shipping order or routing on those goods?

A. Yes, sir.

Q. And where were those to be shipped?

Mr. Bowers: The same objection. I assume that the same testimony, that those were written orders.

Mr. Aten: Answer.

A. They were written orders, yes, sir.

Mr. Bowers: Then we make the same objection to these.

Judge Stephens: Are you pressing the objection that you haven't the original letters here, Mr. Bowers?

Mr. Bowers: Yes. I am pressing that point for this reason, that I am going to ask if the testimony is, as it has been, admitted here on that, for the opportunity to produce from these people, the American Trading Company, and these others, the letters themselves, unless it is stipulated——

Mr. Aten (Interrupting): Well we will produce those. Can you deliver those here, Mr. Brown?

Judge Stephens: Well I wouldn't want the objection to depend upon the fact that we were receiving some evidence in writing. I think you ought to see those.

Mr. Bowers: I am objecting to that, because I think those will show—I have no objection, if the Court please if it is stipulated, which I think is the fact, and I think [fol. 330] the parties here know it is the fact, that these shipping orders were shipping orders that were received

later, nine months later than the making of these contracts, and they were received in fulfillment of subsequent sales that were made by the buyers named under these contracts to other parties. And in other words that Mr. Brown was merely shipping them out and filling out the instructions of the American Trading Company on sales that they made of these same raisins.

Judge Stephens: To the extent that the stipulation goes, will it be accepted by counsel?

Mr. Aten: Well, I think so.

Judge Stephens: Let me follow that with a question.

Q. Mr. Brown, what actually happened to the raisins that were contracted for?

A. We loaded those into cars, and shipped those into interstate commerce and retained title on them for several days, until the goods were paid for. The contract called—permitted them to have ten days to pay for the goods.

Judge Stephens: Who were "them"?

A. The buyer, the American Trading Company in this instance. And often the car would arrive at its destination before the goods were paid for.

Mr. Bowers: We move the answer be stricken out as containing conclusions of the witness, and that the contracts themselves insofar as title and payment are the best evidence.

Mr. Aten: Well I think what the witness is stating is simply they held the bill of lading and the title to the goods until it was paid. I think that is all it amounts to.

Judge Stephens: Overrule the objection.

Judge Beaumont: I think it was a motion to strike.

[fol. 331] Judge Stephens: The motion is denied.

Mr. Aten: In reference to the stipulation, your Honor please, a moment ago, I wasn't paying so close attention to the language that he used, but I did hear him state that these raisins were subsequent sales of the American Trading Company or the other purchasers. That of course we don't know, and are not prepared to stipulate, whether the American Trading Company had at the time they contracted with Mr. Brown on these contracts made sales before they purchased. We are not in position to know that, and we can't stipulate to that.

Judge Stephens: Well, Mr. Brown, from your statement so far—you are here complaining of something. Where were you harmed? Where do you claim that this course that you just described did you any harm? You say you entered into these contracts that we have before us, that you had directions to deliver them to some transportation company, that you held the bill of lading, I believe, as security for the price. What happened after that? Anything? Did you get paid for them?

A. Yes.

Judge Stephens: There was no interruption to the shipment of raisins, was there? You actually completed—you delivered them, and you went into interstate commerce. You got your money for them. What would be your complaint on that?

A. Well we are not complaining against the buyer. We are complaining against the Prorate.

Judge Stephens: I know, but—you see what I am getting at, Mr. Aten?

Mr. Aten: I don't, your Honor. I think the complaint, as I see it, from the—I think—pardon me, Judge.

Judge Yankwich: Go ahead.

Mr. Aten: I think the complaint is that they were dam- [fol. 332] aged by reason of the program. And this particular—I don't know what the fact is, whether Mr. Brown is now testifying he did make an actual shipment on that later or not, but that again, your Honor please, goes back to the time—and I furnished the Court memorandum which is probably still in the file, I don't know that it is—the condition at the time, at the time the suit was filed. That fixes the jurisdictional amount.

Judge Stephens: I am not getting at the jurisdictional amount. That isn't the uppermost thought in mind here. If Mr. Brown, who has here complained, sold his grapes, his raisins, delivered them, and he got paid for them, where is there any complaint?

Mr. Aten: The interference.

Judge Stephens: Where was interference?

Mr. Aten: With the interstate commerce. The program which took control of the raisins——

Judge Stephens: If he conformed to the program, why he waived that objection.

Mr. Aten: He didn't conform, your Honor.

Judge Stephens: Well, he wasn't interfered with, was he?

Mr. Aten: Yes, your Honor. The evidence was immediately the program went into effect, it raised the prices of raisins that he had to go out and buy, and he was damaged even if he filled all his contracts. He was still damaged above the jurisdictional amount, because of the operation of the program.

Judge Yankwich: The point is this, was he damaged by any interference with interstate commerce if he sold to American Trading Company and his obligation was to them? The main question is: has the program as affecting him anything to do with interstate commerce? Perhaps it isn't responsive, but it would seem to me you would [fol. 333] have to show under your requested findings to that effect, you would have to show—or if it is immaterial, then you can depend on the general proposition, but if it is material as the finding you would ask would seem to indicate, you would have to show not only the program as a whole was a burden on the interstate commerce but he in fact was damaged by the interference with the interstate commerce. But if he sold to the American Trading Company, and his obligation was to deliver them, the mere fact they later on gave him shipment shall not affect his shipment of intrastate commerce. He had a purely intrastate transaction with them, and therefore there would be no direct interference with his right to ship in interstate commerce. You see?

Judge Stephens: And if incidentally he would be damaged, that would be an ordinary action in the State court to recover damage.

Mr. Aten: Well the Act itself provides that there is no recovery, no liability on the program or the Zone for any damage they might inflict. But getting back to the question again, here is one contract—I am not certain whether he is speaking of the complete fulfillment of this particular contract or not, but there are five or six other contracts, and there were—some of them at least, if not all were not fulfilled. There were these regulations of the Prorate that held all of these raisins except the 30 per cent free tonnage in the two pools until after January, and he couldn't get raisins, as the testimony shows, for the purpose of shipping under interstate commerce to fill these orders.

Judge Stephens: Pardon me. I think that this is a good time to break this examination and let Mr. Brown go to his [fol. 334] home or office and equip himself with all the papers he is going to refer to. It is fairer to both sides to have them here.

Mr. Aten: That is the shipping orders that were received, I suppose, on any of these contracts? These written orders?

Q. Did you receive any shipping orders orally either by phone or direct communication?

A. I am sure that if we did receive them by phone they were followed up with letters or regular form of instruction.

Mr. Aten:

Q. Mr. Brown, have you now with you any written evidence of the orders that you received on the American Trading Company contracts?

A. Yes, sir.

Q. And will you produce them? You might yourself designate—state what it is and when you received it, and to what point it calls for shipment. Of course the instrument states itself that——

Mr. Bowers: One observation that I have. I don't know what this testimony may go to in this connection, but if it refers to the contracts that are already in evidence, I am wondering if it is admissible as being an attempt to impeach their own witness. Now I call attention to the fact that in the trial of the action, page 40 and 41 of the transcript that the question was gone into. Judge Stephens asked him then, this witness: "You did not have any understanding with anybody that any of these raisins should be shipped out of the state, did you? A. It was understood that they were to be shipped out of the state, your Honor. For instance——" And then a motion to strike, and Judge Stephens continuing:

"Yes. The answer may go out. Did you have any understanding with any of these people that they would ship them out of the state? A. No, sir.

[fol. 335] "Judge Stephens: Did you care whether they were shipped out of the state or not? A. Not particularly, no.

"Judge Stephens: You just understood that they were going to go out of the state? A. Yes.

"Judge Stephens: What was the basis of your understanding that they were to be shipped out of the state?

"A. My basis of understanding was on past performance of contracts made with these people that they were shipped out of the state.

"Judge Stephens: Just because they had purchased raisins before and shipped them out, you assumed they were going to take the same course? A. Yes, sir."

Now it seems to me that that is direct, upon the particular point, as to what happened to these raisins.

Mr. Aten: Immediately following that, if your Honor please,

"By Judge Stephens: Let's see if we can shorten it. Can't we now say each side admits that the raisins which were the subject of these contracts that have just been introduced in evidence would take the same course that is outlined in the stipulation?

"Mr. Aten: We are willing to stipulate to that.

"Mr. Bowers: Yes. We are willing to stipulate to that."

Judge Stephens: But you see, just before that colloquy you asked a question and we sustained the objection to it through my reading those questions—my propounding those questions. Now in going over the record, we made up our minds that we would rather have it directly from the witness rather than by the Court's cross-examination, as it were.

Mr. Aten: Well then that is the purpose of course of the question I have now asked the witness.

[fol. 336] Judge Stephens: The objection will be overruled.

Mr. Aten:

Q. Would you state what you have there on orders——

A. (Interrupting) I have shipping instructions from the American Trading Company for raisins applying against their contract.

Q. And what was the instruction?

Mr. Bowers: Just a moment. It was a written instruction. Let's see it and offer it.

Mr. Aten: We will offer it in evidence, but first——
Mr. Bowers: (Interrupting) We want to see it.
Mr. Aten: Have you more than one?

A. Yes, sir.
Q. If you will give us all of them.

(Witness hands to counsel.)

Q. Are these all of the American Trading?
A. Yes.

Mr. Aten: We have six of them altogether (handing documents to counsel.)
Mr. Bowers: Well, if the Court please, we make the same objection that if they are introduced for the purpose of varying the witness' former testimony, that it is an attempt to impeach their own witness. If they do not vary the same, they are immaterial, because they add nothing to it. And I believe furthermore that they are all matters subsequent to the commencement of this action. I am not sure on all of them on that, but I think they are.
Judge Stephens: It will be overruled.
Mr. Aten: There are six of these shipping instructions from the American Trading Company, Mr. Brown, I believe?

A. Yes, sir.

Mr. Aten: I think since they are all in reference to the same contract that we will just offer them as one exhibit, if that is all right.
[fol. 337] Judge Stephens: They may be deemed read into the record without their being read actually?
Mr. Bowers: Yes.
Judge Stephens: Let them be marked. What mark shall they take?
The Clerk: 10 is the next number, your Honor.

(Offers received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Aten:

Q. Referring to them, Mr. Brown, the first one there, to what destination were the raisins on that order to go?

Mr. Bowers: Just a moment. We object to that. The order speaks for itself.

Mr. Aten: Well the Court hasn't seen them.

Mr. Bowers: Well, they have been offered in evidence for the Court to examine and we—I don't care for the witness' conclusion.

Judge Stephens: What was the question? I didn't get the whole question.

(Question read.)

Judge Stephens: Well, let's see them.

Mr. Aten: I believe that the orders do not all show on their face where the raisins were to go. They were to go to port before going to sea shipment, either Stockton or San Francisco.

Mr. Bowers: The directions were to deliver them to the port of Stockton.

Mr. Aten: But then the witness knows exactly where the raisins were to be embarked for.

Judge Stephens: The Court is of the opinion that the witness may refer to these separate shipping instructions, [fol. 338] and if he knows of his own knowledge what the destination was beyond what is stated on the face, he may state it.

Mr. Aten:

Q. Will you take each of those, Mr. Brown, and state in reference to each lot, if you know, the destination of the goods.

Judge Stephens: Do you want to note your exception to that ruling, Mr.——

Mr. Bowers: Well I understood that we had exceptions to all the Court's rulings, but maybe I am mistaken on that. If so, I would like to note an exception to all of the Court's rulings contrary to our objections.

Judge Stephens: All right.

A. Well first shipping instructions were for a steamer, Kansan.

Judge Stephens: Just reading that from the face?

A. Yes, sir. And these goods were to be shipped to New York.

Mr. Aten:

Q. Does that fact that they were to be shipped to New York appear on the document itself?

A. It does not on this particular document, no, sir.

Q. Very well.

A. On the second shipping instructions we had shipping marks giving the number and the steamer that they were to sail on for Manhattan, and those markings show on the shipping instruction.

On the third shipping instructions the shipping marks were BB and S, Providence Rhode Island, No. 768.

The fourth instructions were for—named the steamer they were for and were sailing to Manhattan and the shipping number and port of landing are shown on the instruction.

Judge Stephens: What is that letter? Let's see it, the letter.

A. And the fifth instructions were—show the steamer they were sailing on, the shipping marks and to the port of Manhattan.

[fol. 339] Judge Stephens: Here is a letter inadvertently included in this exhibit. I don't think it has anything to do with it.

Mr. Aten: Then there are only five of these, instead of six?

A. Yes, sir.

Q. Five in that exhibit. Now do you have the shipping instructions for the Dried Fruit contract that is in evidence?

A. Yes, sir.

Q. The name of that organization was Dried Fruit?

A. Dried Fruit Distributors.

Q. Distributors?

A. Of California.

Q. Yes. How many of those were there?

A. Ten.

Q. Ten of them?

A. Yes, sir.

Q. Mr. Brown, taking these then in the order in which they are there, the name Dried Fruit Distributors does not appear there, but the name of McDonnell. Will you explain that?

A. The Dried Fruit Distributors of California got into a little trouble and Mr. McDonnell asked to have this contract assigned to him. We have the correspondence here covering that matter. Will you——

Q. I don't think it will be necessary to go into that. That explains why it was McDonnell instead of Dried Fruit. But those orders were on the Dried Fruit Distributors' contract?

A. Yes, sir.

Q. And to what destination, if you will take them one by one, were those goods to be shipped?

Judge Stephens: And are you testifying to that from the face or from memory? The face of the document?

A. I will testify from the face of the document.

Q. They do show on the face where they were destined to go?

A. Yes. The markings show.

[fol. 340] Judge Stephens: Well are the markings plain or do we have to them interpreted?

Mr. Aten: Well I am not very familiar. I didn't get a chance to look at them, if the Court please. I am not familiar with them.

Judge Stephens: Well now as an illustration down at the bottom of the first one it says, "'Mark one side 'Q. M. Replacement Center. Torrey Pines, Linda Vista, California. S-3393.'" Does that indicate where they are going? Is that what you meant to call my attention to?

A. Yes, sir.

Judge Stephens: Here is another one something like that.

A. Yes, sir.

Judge Stephens: What does that mean?

A. That means it is going to Quartermaster Corps.

Judge Stephens: Where?

A. That is going to Torrey Pines, California.

Mr. Aten: We will offer then these latter seven as our exhibit. I might state that we have no objection to putting in evidence the whole order that we had, for the reason that the portion of the State shipment is so small that we had no objection to it all going before the Court.

Judge Stephens: Yes. And at the suggestion of Judge Beaumont—I think it is correct, and I believe Judge Yank-

wich does not take any particular opposite view point—these may all be attached together, even the three I handed back to you as one exhibit. But I just wanted to call attention the three I handed back to you are not directed for outside shipment. The rest do. But they may all be admitted for what they are worth as exhibit what——

[fol. 341] The Clerk: Exhibit 11.

Judge Stephens: Now you may attach them and as you refer to them, you may refer to first, second, third or fourth sheet, so you will have a record.

(Documents received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. Mr. Brown, you started to say something about one of these three that were taken out of the group. What was it you wished to say about that?

A. Well there is one there, 115 cases, that we have specific instructions on the back from the Export Department to mark these for the Hawaiian Quartermaster Depot, Honolulu, P. O. 1370-S.

Judge Stephens: That is on the back?

A. Yes.

Judge Stephens: Well then I didn't look at that.

Mr. Aten: Yes. That is all right. I am sorry. I had no opportunity to look at these ahead of time.

Judge Yankwich:

Q. Then, Mr. Brown, as the buyer got ready to take delivery he would send you a shipping instruction or a letter telling you, "Ship a carload on my contract so and so", and you would—I notice some of those he even told you what to put on the car, what label to put on it on one side or the other. Then you immediately—that was a part of your agreement that you would make these deliveries f. o. b. Kerman for the destination which the buyer gave you? Is that the set up? Was that the set up?

A. Yes, sir.

Judge Yankwich: I see. All right.

Mr. Aten:

Q. Would you go through that list then, this last ex-

hibit as quickly as possible designating and telling to the Court what you know about each particular shipment?

[fol. 342] A. The shipment No. 1 was to go — Hudson, Duncan, Longview, Washington.

Judge Stephens: Well that shows on the face of it.

A. Yes, sir.

Judge Stephens: Well I don't see any use repeating it.

Mr. Aten:

Q. If there is anything you know about the shipments other than——

Judge Stephens (Interrupting): Well he knows this mark on the face. But are there any markings that are hieroglyphical or cryptical we don't understand?

Mr. Aten: Very well. I will not pursue that further.

Q. What contract are those orders against, Mr. Brown (handing documents to witness)?

A. These have to do with the West Coast Grower & Packer contract.

Mr. Aten: These are the ones that you examined, Mr. Bowers.

Q. And how many of those are there?

A. 12.

Q. And did you notice, do they all show on their face the point of shipment?

A. They show the lot number, the point of destination and the steamer.

Q. Did you notice, do they all show out of state shipment?

A. Yes, sir.

Mr. Aten: Then we will offer these—the number again were how many?

A. 12, I believe.

Mr. Aten: We offer them all as one exhibit, which will be Exhibit 12, I believe.

The Clerk: Exhibit 12.

Mr. Aten:

Q. Have you another group referring to another contract?

A. No.

Mr. Bowers: And the same objection to this offer for the next exhibit as to the previous exhibits.

[fol. 343] Judge Stephens: Pardon me. I didn't get that.

Mr. Bowers: I say we make the same objection.

Judge Stephens: Oh, yes.

Mr. Bowers: And the same ruling, and our exception to it?

Judge Stephens: Yes. Same ruling.

(Offers received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Aten: Just for the information of the Court without—I know it is not a proper question possibly, but renew the question:

Q. What proportion of the entire shipment there, Mr. Brown, was for out of state shipment?

Mr. Bowers: We make the same objection we did before.

Judge Stephens: Well it is just his own summary of what was there, and if he is wrong, it can be corrected. It is just for the present understanding.

Mr. Aten: Yes.

Judge Stephens: You may answer.

A. We shipped 90 per cent of our production out of state.

Judge Stephens: How much per cent?

A. 90 per cent.

Mr. Aten: I believe that is all.

Judge Yankwich: And that applies to that season?

A. Yes, sir.

Judge Stephens: Now is that, what you testified to here, typical of your business as a packer in raisins in the State of California?

A. Is it typical of me or is it typical of all packers?

Judge Stephens: Of your practice?

A. Yes, sir.

Judge Stephens: Do you know what the practice generally is about the state?

A. I think the practice generally is on about the same [fol. 344] proportion.

Judge Stephens: And the same method of handling?

A. Yes, sir.

Judge Stephens: Generally speaking?

A. Yes, sir.

Q. Mr. Brown, these contracts that you just introduced here on papers, orders, covered a certain period of time. During that period of time—well I will ask you first, you did deliver those grapes, those raisins?

A. Our contract——

Judge Beaumont (Interrupting): No. Just answer yes or no.

Judge Stephens: You did deliver those? You did fulfill those orders?

A. I fulfilled the orders having to do with these documents here.

Judge Stephens: Yes. Now during that period of time did you have orders that you did not fill? Can you answer that yes or no?

A. Yes, sir, I had orders that I did not fill.

Judge Stephens: What was the reason for not filling them?

Mr. Bowers: Well I wonder if we may interrupt the Court so as to keep the record of our objections there? I don't like to, your Honor.

Judge Stephens: Oh, that is all right.

Mr. Bowers: But I think this is matter that was gone into at the trial, and the plaintiff introduced his contracts that he had that showed his orders.

Judge Stephens: Well the court was of the opinion, going over the record, that maybe we stopped before he got to the explanation, and we wanted the whole thing. And I can't see any harm. If it is a fact, let's find it out.

Mr. Bowers: Well if the Court is taking additional testi-

mony on that, but what I want to get at then is we should [fol. 345] have the orders, if there are additional orders.

Judge Stephens: Well we are not limiting it.

Mr. Bowers: All right.

Judge Stephens:

Q. Were there some orders that you couldn't fill?

A. Yes, sir.

Judge Stephens: What were they? First I think you better answer the question I put a while ago. Why didn't you fill them?

A. There were only thirty per cent free tonnage of raisins available, and there weren't sufficient raisins to fill our contracts.

Judge Stephens: Where were those raisins to go that you couldn't fill?

A. Where were the ones that I didn't fill?

Judge Stephens: From whom did you have orders that you could not fill?

A. There is a contract I believe here in evidence.

Judge Stephens: In evidence?

A. From Vagim Packing Company.

Judge Stephens: Where are they located? In California?

A. Yes, sir. And I filled part of the contract, and part I couldn't fill.

Judge Stephens: Do you know where those raisins were to go?

A. Yes, sir. They sent us shipping orders.

Judge Yankwich: Are those orders in the record? Were they produced in the trial, do you know?

Mr. Bowers: No, they have not been introduced as yet. The only shipping orders that have been introduced are the ones that have been introduced right here.

Mr. Aten: Were they for out of the state?

A. Some of the orders showed they were cars to be shipped to C. B. Florsheim at Omaha, Nebraska.

Judge Stephens: If the documents aren't found, then there will be no evidence of it.

Mr. Aten: That is the only one you have (indicating). [fol. 346] Well do you have any correspondence or wires or—for shipments direct to the purchaser out of the state with you?

A. I have two letters here that cover a shipment out of the state.

Q. That you made last year?

A. Yes, sir.

Mr. Aten: I would offer in evidence uniform order, bill of lading, shipper No. 711, Southern Pacific Company, purporting to be from the Empire Packing Co. to Ripley, Mississippi, on December 4, 1940.

Judge Stephens: Well he is just helping us instead of having each of us read it at this time. The Empire Company?

A. It is consigned to the order of the Empire Packing Company, Ripley, Mississippi. Notify King Grocery Company, Ripley, Mississippi. Routing, SP, UP, Wabash, M & O.

The Clerk: This will be Plaintiff's Exhibit 13, Mr. Reporter.

(Offer received in evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Aten:

Q. We have here inclosed receipt and delivery order, Dried Fruit Association of California. Empire Packing Company to Abinante & Nola Packing Company, Winona, Minnesota. Is that an order, Mr. Brown, that you shipped direct to the purchaser in Minnesota?

A. Yes, sir.

Mr. Aten: We offer that in evidence as Exhibit 14, is it?

The Clerk: Plaintiff's Exhibit 14.

Mr. Bowers: Same objection.

Judge Stephens: It will be overruled.

(Offer received in evidence and marked Plaintiff's Exhibit 14.)

[fol. 347] Cross-examination.

Mr. Bowers:

Q. Mr. Brown, referring to the Exhibit 10, the shipping orders that you submitted, will you state as to which of these contracts those shipping orders were applied to?

A. Well I don't recall which Exhibit 10 was.

Q. Well——

A. On each of our invoices the——

Q. Showing you Exhibit 10.

A. This one (indicating). The contract number is shown here, and is shown on the contract.

Q. In other words, the contract that you refer to to which the shipping orders evidenced by Exhibit 10 are applicable is the contract with the American Trading Company which is marked Plantiff's Exhbit No. 9?

A. Yes, sir.

Q. And do these shipping orders that—comprising the Exhibit 10, are all of the orders that you had specifically requesting the delivery or shipping elsewhere?

A. Well I don't understand the question, Mr. Bowers.

Q. Well I mean these shipping orders here do not cover the entire amount of the contract, do they?

A. No, they don't cover the entire contract.

Q. And other than the shipping orders that you have introduced in Exhibit 10, they were the only portions of this contract of Exhibit 9 in which you carried out any instructions from the buyer as to where to deliver the raisins?

A. Well I would like to have that question read.

(Question read.)

A. Well, we delivered all the raisins on that contract.

Mr. Bowers:

Q. Did you have any other instructions with reference to the raisins shown in the contract Exhibit 9, other than the shipping instructions which you have offered here as Exhibit 10?

A. Yes. I had other shipping instructions covering the [fol. 348] total of the contract.

Q. Then do I understand from that that other than as the instructions contained in Exhibit 10 are concerned, whatever other instructions you had did not actually or in your opinion call for the shipment of such raisins outside of the State of California?

A. I believe that they called all for shipment out of the State of California under that contract.

Q. Well then if you have other shipping instructions calling for the delivery outside of the State of California, let's have them. I understood from counsel that he was offering all of the shipping instructions that you had that——

Judge Yankwich: (Interrupting) Wasn't it your understanding that the others are those which Mr. Aten was to get from his own office?

Mr. Bowers: No, your Honor. The ones that Mr. Aten was to get from his office were ones that refer to another contract.

Judge Yankwich: Oh, I see.

Mr. Bowers: I am dealing now only with this particular contract, Exhibit 9. And it was my understanding and I think it was the understanding of all of us here that they were offering here all of the shipping instructions they had which called for delivery of these raisins, at least which called for delivery in their opinion, outside of the state.

Mr. Aten: Well, as far as the offer is concerned, that is correct. As far as I am concerned, that is correct, on which we had delivery made, on which we had delivery actually made. Is that true, Mr. Brown?

A. Well, in getting these orders, I didn't do any bookkeeping as to the exact number of the cases. Now I have [fol. 349] brought all of the orders or instructions that were available having to do with this contract.

Judge Yankwich: The question is have you any other instructions which you didn't bring?

A. Well I have another here, your Honor.

Judge Yankwich: Pardon.

A. I have another here, but I think it is a duplication of one of those.

Judge Yankwich: I see. Well aside from that one are there any others that you know of in existence anywhere that you haven't brought into court?

A. None in my file except this one that I have here.

Judge Yankwich: I see. All right.

Mr. Bowers:

Q. Now, Mr. Brown, referring to these instructions on Exhibit 10, were they received by you at approximately

the date or within a few days subsequent to the date that appears on each of the instructions?

A. A day or so following the instructions, yes, sir.

Q. And you had no instructions prior to the receipt of these that you received here?

A. Yes. On some occasions——

Q. I mean with reference here to this contract?

A. Yes. They often phoned regarding it and then followed up with written instructions.

Q. Well now how long prior to the time of those written instructions would you receive any previous notification?

A. Oh, I would say one or two days.

Q. And insofar as this contract Exhibit 9 is concerned under date of May 14, 1940, you had no instructions at all relative to making any particular delivery for the buyer there until sometime in October of that year?

A. Well——

Q. Calling your attention to the fact that the date—that [fol. 350] the dates of these instructions are October 18, 23, November 7, and December 6, 1940.

A. It—our instruction would have been over the telephone a day or so prior to the receiving of the written instruction.

Q. And now did you carry out the instruction in delivering these raisins referred to in Exhibit 10, sheet one to the Port of Stockton?

A. We delivered these raisins for the Lillian Luckenbach steamer for the Port of Stockton on our contract 0908.

Q. And how were those delivered from your plant to the Port of Stockton?

A. By truck.

Q. And do you know what trucking company?

A. Red Line Transportation, an interstate commerce hauler.

Q. Now, you didn't pay for that transportation, did you?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. And you charged that to the buyer here under the—in addition to the contract price, did you not?

A. I don't think so. I believe that they agreed to—we paid the hauling and—yes, and billed the buyer for the inland freight.

Q. In other words, whatever the expenditures were of

making a delivery of shipment of any of these raisins which they had contracted for in accordance with later instructions subsequent to the contract, if there was any expense of that paid by you, you billed the buyer for it?

A. We billed the buyer for the inland freight.

Q. Now referring to Exhibit 11, can you tell us to which of these contracts the instructions are applied to?

A. Yes, sir.

Q. And that is—all of the instructions contained in Ex-
[fol. 351] hibit 11 refer to the contract Plaintiff's Exhibit No. 8?

A. Yes, sir.

Q. Now in order to shorten the time here, Mr. Brown, would your statements of the manner in which this was handled and the connection between the shipping instructions and the contract be the same as between these instructions and the contract Exhibit 8 as you have stated it with reference to the instructions under Plaintiff's Exhibit 10 and contract Exhibit 9?

A. I believe not. Some of those were interstate shipments by rail, and where they went by rail the buyer pays the freight charges on the other end.

Q. And whatever charges were made in fulfilling the shipping instructions under your Exhibit 11, they were either paid by the buyer direct or you paid them and charged them to the buyer in addition to any of the contract price?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. And likewise insofar as you know the instructions contained in Exhibit 11 are all that you have that so far as you have any knowledge ultimately went outside of the state?

A. Yes, sir.

Q. Now referring to the instructions in your Exhibit 12, can you state to which of these contracts those instructions are applicable?

A. This one here (indicating).

Q. So that the instructions contained in your Exhibit 12 are all applicable to the contract marked as Plaintiff's Exhibit No. 3?

A. Yes, sir.

Q. And those instructions likewise are all of the instructions that you have in regard to that contract that you know of that were destined in any way for outside of this state?

A. Yes, sir.

[fol. 352] Q. And likewise in filling those instructions any additional charges, transportation and so forth, were either paid by the buyer direct or if paid by you they were charged by you to the buyer as additional charges in filling out the instructions over and above the contract?

A. Yes, sir.

Q. And likewise all of these instructions were received by you on or within a few days subsequent to the dates they bear, and if there were any telephone or verbal instructions other than those, they were instructions which these written instructions confirmed within a few days?

A. I believe so, yes, sir.

Q. None of these instructions were given to you at any time at the time that the original contracts were made?

A. I don't recall any of them being given to me at the time the contract was made.

Mr. Aten: If the Court please, there are eight of these orders on the Vagim contract that were filled, and under the stipulation of counsel we would like to have them introduced in evidence, but not actually leave the documents here. We will arrange to exhibit the originals to them with a summary of them and they will be available for use all the time, and can be had if necessary, and I might say that of the eight four, or about half of the shipments, is out of the state and half is in the state.

Mr. Bowers: I would like to ask one question of Mr. Brown, if I may.

Q. Mr. Brown, in regard to these orders and shipping instructions that you received subsequently, it is a fact, is it not, that they were sent out to fill orders which your buyer had received for the raisins, and that they were dis-

[fols. 353-354] posed of by the American Trading Company and the other buyers to whom you sold them, to someone else?

A. Well we shipped them to the point of destination furnished by the American Trading Company.

Q. Yes. And you knew that that was to fulfill orders which the American Trading Company had received from those points?

A. On the American Trading Company contracts, yes.

Q. And that is true of practically all of them, all the shipping orders, regardless of American Trading Company or the West Coast or any of the other contracts, was it not?

A. No. We testified that we shipped some of those direct to the buyers, and furnished the documents showing we did ship some of them direct.

Q. Some of them?

A. Yes.

Q. But I say the principal ones, practically the bulk of them, were sent out to fill the orders which your buyers had received?

A. I believe that information is contained in the document there.

Q. Well, that is a fact, isn't it? You are familiar with those documents and you are familiar with the practice, aren't you?

A. Yes, sir.

Q. And that is a fact, isn't it?

A. Yes.

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[fol. 355] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 25, 1942

Come now the appellants, and each of them, in the above entitled cause and in support of their appeal hereby file their definite statement of the points on which they intend to rely and hereby states such points to be as follows:

That the District Court of the United States, in and for the Southern District of California, Northern Division, and the special three-judge court organized and sitting therein erred:

[fol. 355-1] 1. In finding and holding that the court has jurisdiction of this cause and in failing to dismiss this action for lack of jurisdiction.

2. In finding and holding that plaintiff (appellee) has not been guilty of laches and is not estopped to question the

constitutionality of the seasonal proration program for raisins herein mentioned.

3. In finding and holding that the seasonal marketing program for raisins for 1940-41 adopted pursuant to the provisions of the Agricultural Prorate Act of the State of California as amended, constitutes and is a direct, substantial, illegal and unconstitutional interference with interstate and foreign commerce in wholesome and sound raisins.

4. In finding and holding that plaintiff (appellee) is entitled to an injunction permanently enjoining, and in permanently enjoining, defendants (appellants) from enforcing or attempting to enforce, or attempting to procure the enforcement in any manner of said seasonal marketing program for raisins against plaintiff (appellee) or anyone dealing with him in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, and enjoining defendants (appellants) from in any manner annoying, harassing, or molesting plaintiff (appellee) or persons doing such business with him.

5. In failing to specify whether the matters found in [fol. 355-2] paragraph I of the Findings of Fact were, or occurred in connection with, interstate or intrastate transactions and in denying defendants' (appellants') request for such specification and in denying the request and in failing to expressly find that all of such penalties and all of the business and all of the damage set forth and mentioned in said paragraph I were solely and wholly intrastate.

6. In finding in paragraph I of the Findings that defendants (appellants) "have directly interfered with and obstructed plaintiff's said business and thereby damaged the plaintiff in a sum in excess of $3,000.00," contrary to the evidence introduced and in the absence of any issue or pleading to that effect.

7. In finding in paragraph VI of the Findings of Fact "That 90% to 95% of the naturally dried raisins consumed in the United States are produced in said zone" and in denying the request of defendants to eliminate such statement, and in further finding in said paragraph "that 90% to 95% of such raisins produced in said zone are consumed

outside the State of California", and in denying the request of defendants to change such statement to read in conformity to the stipulation of facts that "such raisins are ultimately consumed both within and without the State of California, but 90% to 95% of the raisins consumed as raisins, and for human consumption, are ultimately consumed outside of the State of California".

[fol. 355-3] 8. In finding in paragraph VIII of the Findings of Fact that "Such process is entirely accomplished on the premises where the grapes are grown, and when properly done, the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce. They are then substantially ready for market as raisins. The process of cleaning, stemming, cap-stemming, seeding (muscats only), grading, sorting and packaging in various sized containers, which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater demand for them in the market, but is not essential to production," and in overruling the objections of the defendants (appellants) thereto and in denying their request to substitute therefor a statement that "Such process is sometimes completed on the premises where the grapes are grown and sometimes after they have been delivered to the premises of the packers; that when so delivered to the packers they have not been subjected to any cleaning or other treatment and are in clusters attached to the dried stems upon which they mature except such as have fallen from such stems and generally still have attached a portion of the stem and when received by the packer from the producer in such condition they are edible but are not the subject of trade or commerce and are not marketable except in the transaction between the producer and packer and are never sold in such condition [fol. 355-4] to the trade or to consumers."

9. In making each and all of the findings set forth in paragraph X of the Findings of Fact herein and in overruling the objection of defendants (appellants) thereto.

10. In finding and holding that the said seasonal marketing program for 1940-41 and the enforcement thereof by defendants directly and substantially interferes with and burdens and prevents the free flow of interstate commerce.

11. In holding that such seasonal marketing program for raisins is not based upon the protection of the industry through exclusion from the market of physically and economically unfit raisins.

12. In holding and ruling that such seasonal marketing program is not a regulation of proper conditioning and preparation for market of the raisins and of their movement from the producer into a primary channel of trade prior to their being offered to the consumer.

13. In holding and ruling that the purpose and necessary effect of such seasonal marketing program for raisins is to place a controlled embargo on the raisin production of the State.

14. In holding and ruling that such seasonal marketing program is simply a means of controlling the supply of raisins into interstate trade channels.

[fol. 355-5] 15. In holding and ruling that any regulation of the amount of wholesome or sound raisins which may be produced, harvested and/or prepared for market and moved from the producer into the primary channels of trade in accordance with and in the amount and at the times that the available market will absorb the same, constitutes a direct burden upon and an obstruction of interstate commerce.

And appellants further state that only the following parts of the record as filed in this court are necessary for the consideration and need be printed by the Clerk for the hearing of the cause:

| Title of Paper | Record Page |
|---|---|
| Amended Complaint | 78 |
| Answer to First Amended Complaint (omitting Exhibit "A" thereof) | 108 |
| Stipulation as to Certain Facts | 162 |
| Letter of Walter L. Bowers to court | 174 |
| Findings of Fact and Conclusions of Law | 189 |
| Final Judgment | 202 |
| Statement of Evidence | 231-292, both inclusive |
| [fol. 355-6] Statement of Evidence, beginning with words "Redirect examination", page 297, to and including the word "Yes" on line 28, page 305 | 297-305 |

Earl Warren, Attorney General of the State of California; Walter L. Bowers, W. R. Augustine, Gilbert F. Nelson, Deputies Attorney General; Strother P. Walton, Attorneys for Appellants.

[fol. 355-7] Receipt of copy of the foregoing Statement Of Points To Be Relied Upon And Designation Of The Parts Of The Record To Be Printed is hereby acknowledged this 21st day of March, 1942.

Aten & Aten, and G. L. Aynesworth, By Richard V. Aten, Attorneys for Appellee.

[fol. 355-8] [File endorsement omitted.]

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[fol. 356] In Supreme Court of the United States

Stipulation in Re Printing of Record—Filed March 25, 1942

It Is Hereby Stipulated by and between the above named appellants and appellee, through their respective counsel of record herein, that

Whereas, the "Marketing Program for Raisins, as Amended" issued July 23, 1940, and set forth as Exhibit "A" of the Answer to First Amended Complaint herein is printed in full in the appellants' Jurisdictional Statement on Appeal filed herein; that the same need not be reprinted in the record on appeal herein but that wherever in such [fol. 356-1] record the said Marketing Program appears reference may be made thereto and the fact noted that the same appears in full in said appellants' Jurisdictional Statement on Appeal as Exhibit 1 thereof, or in such other manner as the Clerk of the above entitled court may designate.

Dated: March 21, 1942.

Earl Warren, Attorney General of the State of California; Walter L. Bowers, W. R. Augustine, Gilbert F. Nelson, Deputies Attorney General; Strother P. Walton, Attorneys for Appellants. Aten & Aten, and G. L. Aynesworth, By Irvine P. Aten, Attorneys for Appellee.

[fol. 356-2] [File endorsement omitted.]

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[fol. 357] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED —Filed March 30, 1942

To the Clerk of the above entitled Court:

Appellee thinks that those portions of the Statement of Evidence which are omitted in the designation filed by Appellants are material and requests that those portions of the evidence be printed.

Dated: March 28, 1942.

Christian M. Ozias, G. L. Aynesworth, Irvine P. Aten, Richard V. Aten, Attorneys for Appellee.

[fol. 357-1] [File endorsement omitted.]

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[fol. 358] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 1040

ORDER NOTING PROBABLE JURISDICTION—April 6, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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Endorsed on Cover: Enter Earl Warren. File No. 46,368. S. California, D. C. U. S., Term No. 1040. W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, et al., Appellants, vs. Porter L. Brown. Filed March 13, 1942. Term No. 1040 O. T. 1941.